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## Local Governments and Global Commons

Jonathan Rosenbloom\*

### ABSTRACT

*This Article explores the decisions local governments make when confronted with a global commons collective action problem. Local governments often assume a role analogous, but not identical, to that of an individual private actor on a traditional commons. Unlike private actors, however, local governments are subject to a unique set of legal restrictions. This Article analyzes some of those legal restrictions and explores whether the restrictions alter local government “rational” decision making relative to global commons resources. The Article predominantly focuses on international and national laws and how those laws encourage or discourage the sustainable management of global commons resources. The analysis reveals that local governments are often intimately involved in decisions that influence global commons resources, including the atmosphere. Further, international and national restrictions propel local governments into a tragedy of the global commons by, among other things, diluting and limiting local government authority to address multi-jurisdictional commons challenges. In light of this, the Article reimagines the role of local governments and the authority they have to manage global commons resources. The Article offers three examples that selectively reduce barriers prohibiting local governments from sustainably managing resources without sacrificing national sovereignty or supremacy. These*

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*examples are designed to facilitate a discussion on incorporating local governments into the international and national discourse on effectively avoiding the misuse of global commons resources.*

## INTRODUCTION

Local governments consume global commons resources every day.<sup>1</sup> For example, clean air is a commons resource all cities share.<sup>2</sup> When City A generates electricity with a coal-burning plant, it may affect City B and its inhabitants (as well as other cities and their inhabitants) through the increased release of greenhouse gases, such as carbon dioxide and nitrogen oxide, into the atmospheric commons.<sup>3</sup> Similarly, City B may discharge sewage into a clean water source that runs downstream to City A and others.<sup>4</sup> City A's and City B's actions involve municipal decisions to use shared resources, and that use results in negative consequences for other cities. Because resources such as the atmosphere and fresh water do not adhere to political boundaries, City A and City B could be hundreds of miles apart in separate national jurisdictions and, yet, the resource

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1. Because this Article is exploring local actions that have consequences in at least one other country, "global" is used interchangeably with "international" and "multi-jurisdictional." The issues raised and the challenges confronted are similar from a local government's perspective whether the resource is truly global, such as the atmosphere, or regional, such as a shared water source like the Baltic Sea. This Article uses "city," "local government," and "municipality" interchangeably, meaning every general purpose incorporated subdivision that is self-governed (including towns and villages), counties and parishes, and special purpose or quasi-public entities (such as housing authorities).

2. Throughout the Article, I refer to local governments as appropriating commons resources. This is intended to mean not only the direct appropriation of those resources (such as through a municipally owned electric company), but also the indirect appropriation of those resources through a failure or inability to sustainably manage private appropriation of the resources (such as through traditional Euclidean zoning ordinances).

3. See generally Diane Cardwell, *Cities Weigh Taking Over From Private Utilities*, N.Y. TIMES (Mar. 13, 2013), available at <http://www.nytimes.com/2013/03/14/business/energy-environment/cities-weigh-taking-electricity-business-from-private-utilities.html?ref=business&r=2&> (discussing local government initiatives to generate electricity); see also Erica Meltzer, *It's Official: Boulder Creates Energy Utility*, DAILY CAMERA (May 6, 2014), available at [http://www.dailycamera.com/news/boulder/ci\\_25712168/boulder-creates-energy-utility](http://www.dailycamera.com/news/boulder/ci_25712168/boulder-creates-energy-utility) (noting Boulder's creation of a municipal utility to replace and/or takeover a private sector run coal-burning plant).

4. See, e.g., *infra* notes 53–66 discussing extraterritorial impacts stemming from local water management in the Chicago River and Lake Michigan.

use decisions made in one city may impact the health and wellbeing of another city.

The decisions local governments make will be increasingly important to properly manage common resources. There are over 90,000 local governments in the United States alone (about 3,000 counties, 19,500 municipalities, 16,300 towns or townships, 38,250 special districts, and 12,900 school districts).<sup>5</sup> At least fifty-two percent of the global population and eighty-two percent of the U.S. population live in “urbanized areas,” and this percentage is expected to increase.<sup>6</sup> Cities also consume large amounts of resources, including clean air, with cities emitting forty-five percent to seventy-five percent of global greenhouse gases.<sup>7</sup> As populations and resource consumption grow, local governments will play an increasingly important role in the management of global commons resources.

Local policies that involve the consumption of global or multi-jurisdictional commons resources are plentiful, ranging from seemingly mundane, everyday actions, such as procurement and hiring policies,<sup>8</sup> to more dynamic actions, such as zoning, economic

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5. U.S. Census Bureau, Geography Division, *Number of Local Governments by State and Type: 2012* (July 2013), [http://www2.census.gov/govs/cog/2012/2012\\_cog\\_map.pdf](http://www2.census.gov/govs/cog/2012/2012_cog_map.pdf).

6. Gabe Klein, *The Inevitable, Accelerating Rise of Urbanization*, URBANLAND (July 14, 2014), available at [http://urbanland.uli.org/news/inevitable-accelerating-rise-urbanization/?utm\\_source=uli&utm\\_medium=eblast&utm\\_campaign=071414](http://urbanland.uli.org/news/inevitable-accelerating-rise-urbanization/?utm_source=uli&utm_medium=eblast&utm_campaign=071414) (internal quotation omitted).

7. Intergovernmental Panel on Climate Change, Working Group III, *Climate Change 2014: Mitigation of Climate Change*, ch. 12, at 16 (2013); Hari M. Osofsky, *Multiscalar Governance and Climate Change: Reflections on the Role of States and Cities at Copenhagen*, 25 MD. J. INT’L L. 64, 66 (2010) (“The [Copenhagen Climate Communiqué] indicates that . . . urban areas produce up to seventy-five percent of global greenhouse gas emissions.”) (citing The Copenhagen Climate Summit for Mayors, Copenhagen, Den., Dec. 14–17, 2009, *Cities Act: Copenhagen Climate Communiqué* (Dec. 16, 2009), available at [http://www.kk.dk/Nvheder/2009/December/~/\\_media/B5A397DC695C409983462723E31C995E.ashx](http://www.kk.dk/Nvheder/2009/December/~/_media/B5A397DC695C409983462723E31C995E.ashx)).

8. Typical local procurement policies are predominantly based on the lowest responsible bidder. Lowest responsible bidder policies require local governments to award a contract to whichever bidder offers the lowest price, regardless of external costs to, for example, the environment or society. See 81A C.J.S. *States* § 286 (2013). A small minority of procurement policies incorporate alternative considerations, such as the impact to the environment. See *S.F. Becomes 1st U.S. City to Adopt Green Product Procurement Law*, WASTE & RECYCLING NEWS (Jun. 24, 2005), available at <http://www.wasterecyclingnews.com/article/20050624/NEWS99/306249997> (discussing a 2005 San Francisco ordinance requiring the



development, production of energy, and water, forest, and waste management.<sup>9</sup> In adopting these policies, a local government may use a resource in a way that has costly impacts on the resource and thus on other local governments. Absent intervening management measures, such as international, national, or state regulations managing the commons, each city can pursue its self-interested goals to maximize economic gain.<sup>10</sup>

Through a traditional law and economics lens, the rationality of cities unfolds as follows: it appears to be in a city's best interest to consume resources as fast as possible to spur economic growth (and to consume the resource before other cities do) because individual returns of appropriating a resource will outweigh the individual costs when externalities are discounted, often resulting in overconsumption of the resource. Local decisions to consume resources in this manner would be described in traditional law and

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city to purchase more environmentally friendly products); Press Release, City of San Jose, San Jose Wins Green California Leadership Award (Apr. 9, 2008), *available at* <http://www.sanjoseca.gov/DocumentCenter/View/763> (discussing San Jose's Environmentally Preferable Procurement Program (EP3), which identifies and procures "environmentally superior goods and services"). For an example of the externalities relevant to local hiring practices, see John Upton, *State Lawmaker Vows to Fight San Francisco Local-Hiring Law*, THE BAY CITIZEN (Dec. 27, 2010), *available at* <https://www.baycitizen.org/news/jobs/jerry-hill-vows-fight-san-francisco-law/> (reporting the opposition to a 2010 San Francisco ordinance that set minimum requirements for hiring San Francisco residents for construction projects funded by the city due to the perceived negative effect it would have on workers who live outside the city's borders).

9. For a discussion of externalities stemming from zoning, see Amnon Lehavi, *Intergovernmental Liability Rules*, 92 VA. L. REV. 929, 935–48 (2006); for economic development, see Ilya Somin, *Federalism and Property Rights*, 2011 U. CHI. LEGAL F. 53, 79 (2011) (citing Ilya Somin & Jonathan H. Adler, *The Green Costs of Kelo: Economic Development Takings and Environmental Protection*, 84 WASH. U. L. REV. 623, 641–65 (2006)) (arguing that "economic development's takings often cause negative environmental externalities by subsidizing inefficient development projects and targeting open space and private conservation areas"); from forest management practices, see Blake Hudson, *Climate Change, Forests, and Federalism: Seeing the Treaty for the Trees*, 82 U. COLO. L. REV. 363, 372–81 (2011); from water management policies, see *infra* notes 51–61 discussing extraterritorial impacts stemming from local water management of the Chicago River and Lake Michigan.

10. For a future piece, I am researching whether local governments can legitimately be thought of as seeking economic gain when making policy decisions. That piece more broadly examines political and social science influences (and variations among geographical areas) affecting local government behavior, while this Article is exploring the legal influences impacting local governments.

economics rational choice literature as “rational thinking.” It is rational in the sense that each city views itself in competition for resources with other cities. A rational city would conclude that it is in its best interest to quickly consume resources before other cities consume them. The decision of an “irrational” city would consist of limiting consumption of the resource, even though other cities continue to utilize the resource. For example, a local government’s decision may be rational if it lures agricultural farming and investment by permitting farming up to a river’s edge. While the local government’s decision may enhance local development, it also may result in nutrient and pesticide run-off, damaging water resources downstream.<sup>11</sup> An irrational decision may include a local policy to institute buffer zones between agricultural areas and streams. This would be irrational because it may lead to lower development—an internal cost to the city—while the benefit of the city’s actions are externalized or shared with cities downstream. Because thousands of local governments consume numerous global commons resources, classic tragedy problems arise in which motivations are in place for cities to act “rationally” (consume resources) and enter into a competitive race—to the “[r]uin” of the resource.<sup>12</sup>

This Article questions whether local governments’ actions can be explained by a straightforward tragedy of the commons analysis, as set forth above, in which cities act “rationally” as wealth maximizers. The objective of the Article is to help avoid resource depletion. To reduce the problems of resource overuse we must begin with a better understanding of the constraints limiting local government’s ability to sustainably manage commons resources. The Article seeks to identify the legal restrictions on local governments that encourage using resources in a way that negatively impacts those resources and other local governments. Specifically, the Article focuses on

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11. See, e.g., Donnelle Eller, *Nitrate Levels Hit Record Highs in 2 D.M. Rivers*, DES MOINES REG. (Dec. 5, 2014), <http://www.desmoinesregister.com/story/money/agriculture/2014/12/04/high-nitrates-des-moines/19906717/> (stating that the City of Des Moines has experienced record high nitrate levels in its two primary sources of potable water because fertilizer and manure is washing from upstream farms and lawns into the water sources).

12. Garret Hardin, *Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

international and national restrictions local governments confront when facing global commons resource challenges. While it is typically assumed in the scholarship that local governments will act “rationally” of their own accord and volition, this Article tests that assumption and shows that often local governments may want to act irrationally (preserve the resource), but they are not legally free to do so. They are prohibited by international and national laws (and state laws, as explored in a prior companion piece)<sup>13</sup> from acting irrationally and against their short-term economic interest, even if their action would help to preserve the long-term viability of the commons resource.

Outside the context of local governments, several lines of scholarship have emerged challenging Garret Hardin’s *Tragedy of the Commons* analysis concerning whether individuals are truly “independent, rational” actors.<sup>14</sup> These challenges question whether

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13. In an earlier piece, I explored U.S. state government legal principles, such as home rule and preemption laws, and how they impact local government behavior and decision making when those decisions implicate commons resources. That research also focused on state barriers local governments face when considering collaboration as a means to sustainably manage a shared resource. Jonathan Rosenbloom, *New Day at the Pool: State Preemption, Common Pool Resources, and Non-Place Based Municipal Collaborations*, 36 HARV. ENVTL. L. REV. 445 (2012).

14. See, e.g., Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 AM. J. SOCIOLOGY 481 (1985); Richard H. Thaler, *The Psychology of Choice and the Assumptions of Economics*, in QUASI RATIONAL ECONOMICS (1991); Richard H. Thaler, *Anomalies: The Ultimatum Game*, 2 J. ECON. PERSP. 195 (1988); RICHARD THALER, THE WINNER’S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE, 96–98 (1992) (noting the willingness of people to contribute to the public good despite motivations to act rationally); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000); Herbert A. Simon, *Rational Choice and the Structure of the Environment*, in MODELS OF MAN: SOCIAL AND RATIONAL (1957); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974); Neil D. Weinstein, *Unrealistic Optimism About Future Life Events*, 39 J. PERSONALITY & SOC. PSYCHOL. 806 (1980); Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979); William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7 (1988); Elinor Ostrom, *A Behavioral Approach to the Rational Choice Theory of Collective Action*, 92 AM. POL. SCI. REV. 1 (1998) (seeking to “expand the range of rational choice models we use” including situational variables that affect the cost-benefit analysis); ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 58–103 (1990) (observing certain characteristics when individuals collaborate to successfully manage a common pool resource); Bryan E. Burke, *Hardin Revisited: A Critical Look at Perception and the Logic of the Commons*, 29 HUM. ECOLOGY 449,

external forces that are not valued in the typical tragedy of the commons analysis can encourage or discourage rational decision making by actors. External influences examined include cultural, behavioral, and political factors, and a smaller body of literature has explored how legal factors influence individuals' choices on the commons. Particularly relevant for this Article, Nobel Prize winner Elinor Ostrom argued that actors are not locked into rational decision making (i.e., competitive consumption of resources) and instead may successfully protect resources through collective action.<sup>15</sup> Ostrom set forth a variety of characteristics under which groups of individuals have acted "irrationally," even though they were not required to do so by law or given private property rights to protect the resource.<sup>16</sup>

None of these factors has been fully analyzed in the context of local governments.<sup>17</sup> Current scholarship applying a tragedy of the commons analysis to local governments does not delve into external influences that drive local government decisions. Influential strains of scholarship focus almost exclusively on identifying and expanding the various types of commons resources, ranging from climate change to parking spaces.<sup>18</sup> The singular line of inquiry focused on *resources*

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457 (2001) (summarizing Ostrom's argument that "it may be rational for common resource users to forego individual benefits and cooperate toward collective goals"); Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986) (demonstrating how ranchers in California dealt with damages from wandering cattle); ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991) (expanding the study); Daniel Kahneman et al., *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728 (1986) (finding that actors act contrary to self-interest due to concerns of fairness). One could argue the law influences social relations (Granovetter), Heuristics, social norms (Korobkin, Ulen, Ellickson), and fairness, but prior scholars have not made this connection in the context of commons resources.

15. OSTROM, *GOVERNING THE COMMONS*, *supra* note 14, at 14, 25.

16. *Id.* at 91–102.

17. In one of the few articles that raise the issue relevant to cities and external factors, Katherine Trisolini and Jonathan Zasloff accept the tragedy and explore political science and international relations theories on how local governments may behave. Trisolini and Zasloff do not discuss the institutional structure or the law. Katherine Trisolini & Jonathan Zasloff, *Cities, Land Use, and the Global Commons: Genesis and the Urban Politics of Climate Change*, in *ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES* (William C. G. Burns & Hari M. Osofsky eds., 2009).

18. *See, e.g.*, Thomas Merrill, *Golden Rules for Transboundary Pollution*, 46 DUKE L.J.

assumes that local governments behave the same—and have the same motivations on the commons—as all “independent, rational” actors.<sup>19</sup> This assumption minimizes the existing and varying legal and institutional structures that alter actors’ behavior on the commons and influence the collective action analysis. The assumption does not fully capture why local governments make decisions relative to global commons resources.<sup>20</sup>

This Article explores the unique international and national legal restrictions placed on local governments that may make local governments act more rational or self-interested. Specifically, this Article expands existing critiques of the “rational” actor to identify a group of influences relevant to international and national legal factors to give a more complete picture of local governments acting on the global commons.<sup>21</sup> While cultural, behavioral, and political grounds have significant potential to influence cities, this Article focuses on the legal influences in order to set a foundation to study the cultural, behavioral, and political influences in future work.

Part I provides a background on the tragedy of the commons, paying particular attention to the characteristics necessary to define a commons actor as an “independent, rational, free-enterpriser.” Part I continues by noting the scholarship that assumes local governments are “independent, rational, free-enterprisers” and, as such, without

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931 (1997) (water and air pollution); Emily C. Powers, *Fracking and Federalism: Support for an Adoptive Approach that Avoids the Tragedy of the Regulatory Commons*, 19 J.L. & POL’Y 913 (2011) (hydrofracking); Michael L. Stokes, *Access Management: Balancing Public and Private Rights in the Modern “Commons” of the Roadway*, 60 CLEV. ST. L. REV. 585 (2012) (roads).

19. Compare Merrill, *supra* note 18 (applying a tragedy of the commons analysis to state actors), with Sheila R. Foster, *Collective Action and the Urban Commons*, 87 NOTRE DAME L. REV. 57 (2011) (applying a tragedy of the commons analysis to individuals). Both Merrill (with state actors) and Foster (with individuals) assume that each is an “independent, rational, free-enterpriser” as discussed by Hardin. See Foster, at 58–59; Merrill, *supra* note 18, at 972–76.

20. A Westlaw search of “independent, rational, free-enterpriser” results in twenty-two documents in the “Journals & Law Reviews (JLR)” database, while a search of “Tragedy of the Commons” results in 2,983.

21. Although not the primary objective of this Article, by implication the Article critiques the rational actor idea generally when it fails to consider legal restrictions. However, this Article is most concerned with whether local governments can accurately be predicted to act rationally.

some intervening force, will consume resources to their ruin. Part II sets forth local governments' place within the larger international institutional structure and identifies the unique legal restrictions that help establish the division of authority among government bodies. This Part describes the numerous international laws and varying national policies that alter local decisions relative to commons resources. As an example, cities in Italy and the U.S. are subject to different international and national policies relevant to climate change.

Part III builds off Part II by exploring how, if at all, the unique international and national legal obligations applicable to local governments interfere with cities' ability to preserve commons resources (i.e., act rationally). For example, how the differences between the national and subnational policies in Italy and the U.S. alter local governments' rational decision making. While some local governments may be content to consume resources to their ruin (i.e., act rationally), as evidenced by urban sprawl, some local governments would act irrationally and preserve resources in the absence of legal constraints stopping them from doing so.<sup>22</sup> Those legal constraints prohibit cities from preserving resources against their short-term economic interest, even though their action might preserve the long-term viability of the commons resource.

Part IV suggests that international and national legal obligations exacerbate the trajectory of the tragedy of the commons at the local level by interfering with and limiting the options available to local governments confronting global commons challenges. The combination of international and national laws limits the ability of local governments to address global commons challenges through their only two *self-initiated* options—collaboration and altruism. In light of this, the Article finds that not enough emphasis is given to legal factors relative to local governments appropriating from global commons resources. Accounting for the diverse legal factors constraining local governments may help avoid the problems of resource overuse by more accurately depicting why local

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22. See, e.g., Robinson Twp. v. Pennsylvania, 83 A.3d 901 (Pa. 2013) (upholding local governments' ability to limit and ban fracking as part of their land use powers), discussed in more detail *infra* notes 184–87 and accompanying text.

governments make some choices and more precisely addressing the problem.

The Article concludes with three examples that target barriers prohibiting local governments from sustainably managing resources without sacrificing national sovereignty or supremacy. The examples are designed to reimagine local governments' role in managing global commons resources and to facilitate a discussion on incorporating local governments into international and national policies to help avoid the tragic depletion of vital global resources.

# I. LOCAL GOVERNMENTS AS "INDEPENDENT, RATIONAL, FREE-ENTERPRISERS" ON THE GLOBAL COMMONS

## A. *Tragedy of the Commons and the Independent, Rational, Free-enterpriser*

The tragedy of the commons has been an effective concept for contemplating how laws and behavior impact the consumption or use of resources.<sup>23</sup> In the *Tragedy of the Commons*, Garrett Hardin describes herdsmen rearing cattle on a pasture.<sup>24</sup> Hardin hypothesized that if the herders and pasture have certain characteristics, self-interest will prove to be too strong and will lead the herders to over-consume the resource.<sup>25</sup> The characteristics relevant to the pasture, or any resource subject to a tragedy of the commons analysis, include depletable and non-excludability.<sup>26</sup> As

23. See THE NATURAL ADVANTAGE OF NATIONS: BUSINESS OPPORTUNITIES, INNOVATION AND GOVERNANCE IN THE 21ST CENTURY 178 (Karlson 'Charlie' Hargroves & Michael H. Smith) (2005).

24. Hardin, *supra* note 12, at 1244.

25. *Id.*; see Thomas Dietz, Elinor Ostrom & Paul C. Stern, *The Struggle to Govern the Commons*, 302 SCI. 1907, 1907 (2003) ("In 1968, [Garrett] Hardin drew attention to . . . the way[s] in which humans organize themselves to extract resources from the environment and contribute effluent to it—what social scientists refer to as institutional arrangements."). Hardin's assumptions about individual behavior resemble the conclusions reached by the law-and-economics movement—a behavioral theory based largely on "rational choice theory." Korobkin & Ulen, *supra* note 14, at 1053, 1055. Hardin's assumptions are also deeply connected to the free-rider problem articulated by Mancur Olson. MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 33–52 (1965) (setting forth a series of free-rider problems).

26. Robert O. Keohane & Elinor Ostrom, *Introduction*, in LOCAL COMMONS AND GLOBAL INTERDEPENDENCE 1, 13 (Robert O. Keohane & Elinor Ostrom eds., 1995); see also

to depletable, partial consumption of a resource by one actor makes it unavailable for consumption by another actor.<sup>27</sup> As to non-excludability, the resource must be open to all actors to appropriate as much as possible and as often as possible; and no herder may be authorized to exclude others from using the resource. In other words, “the grass resource [Hardin’s pasture] consumed by one herder is no longer available to others (depletable), and it is very difficult to exclude any one herder from consuming the resource (non-excludable).”<sup>28</sup> Any resource maintaining these characteristics is called a “common pool resource,” and has the potential to be subject to Hardin’s analysis.

Pursuant to Hardin’s analysis, once a resource is classified as a common pool resource, the actor must also have specific characteristics before a tragedy will ensue. Herders and other individual actors using a common pool resource are called “appropriators.”<sup>29</sup> Hardin theorized that appropriators will consume resources to their “[r]uin,” so long as each appropriator can be characterized as an “independent, rational, free-enterpriser.”<sup>30</sup> While Hardin does not provide extensive details on what amounts to an

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Daniel H. Cole & Elinor Ostrom, *The Variety of Property Systems and Rights in Natural Resources* 5 (Sch. of Pub. & Envtl. Aff., Ind. Univ., Research Paper No. 2010-08-01), available at <http://ssrn.com/abstract=1656418> (citing Vincent Ostrom & Elinor Ostrom, *A Theory for Institutional Analysis of Common Pool Problems*, in *MANAGING THE COMMONS* 157–72 (Garrett Hardin & John Baden eds., 1977)) (noting that common pool resources are “large enough that it is costly to exclude potential beneficiaries . . .”); Oran R. Young, *The Problem of Scale in Human/Environment Relationships*, in *LOCAL COMMONS AND GLOBAL INTERDEPENDENCE*, *supra*, at 27, 29 (describing common pool resources as “used by a group of appropriators that is both non-excludable and depletable”); Elinor Ostrom, *The Challenge of Common-Pool Resources*, 50 *ENV’T* 10, 11 (2008) (stating “systems, such as knowledge and the digital world, in which it is difficult to limit access, but one person’s use does not subtract a finite quantity from another’s use”).

27. A part of a commons resource is known as a “resource unit.” Resource units are “what individuals appropriate or use from resource systems.” OSTROM, *GOVERNING THE COMMONS*, *supra* note 14, at 30.

28. Blake Hudson & Jonathan Rosenbloom, *Uncommon Approaches to Commons Problems: Nested Governance Commons and Climate Change*, 64 *HASTINGS L.J.* 1273, 1283 (2013).

29. See OSTROM, *GOVERNING THE COMMONS*, *supra* note 14, at 31. Ostrom gives numerous examples of appropriators, such as herders, fishers, irrigators, commuters, and “anyone else who appropriates resource units from some type of resource system.” *Id.*

30. Hardin, *supra* note 12, at 1245.



independent, rational free-enterpriser, at a minimum, appropriators are assumed “to maximize their self-interest” by making a short-term cost-benefit calculation.<sup>31</sup> That calculation suggests she will benefit from consumption of each additional unit of the resource (i.e., all the “proceeds” from the sale of additional cattle on the pasture) and that she will not incur most of the cost of her action (i.e., overgrazing), because the cost will be spread among all herders.<sup>32</sup> In this way, each independent, rational appropriator will determine that it is in her best interest to consume the resource because individual returns will outweigh individual costs.<sup>33</sup> Upon this rational decision, appropriators will perceive themselves as being in constant competition for the resource and a tragedy will ensue.<sup>34</sup>

Critical to Hardin’s analysis is the assumption that independent, rational free-enterprisers’ decisions concerning the use of the commons are guided by a short-term cost-benefit analysis. Absent some coordinating force arising either internally from the collection of individuals using the resource or externally from an outside authority,<sup>35</sup> this independent, rational position that Hardin relies on to hypothesize that individuals will perceive themselves in competition with others eventually leads to destruction of the resource.<sup>36</sup> As Hardin stated: “we are locked into a system of ‘fouling our own nest,’ so long as we behave only as independent, rational, free-enterprisers.”<sup>37</sup>

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31. Korobkin & Ulen, *supra* note 14, at 1055.

32. Hardin, *supra* note 12, at 1244.

33. *Id.*

34. *Id.*

35. Hardin stated that a tragedy may be avoided through external government control or by dividing the resource into private property. *Id.* at 1245–46. *But see* OSTROM, GOVERNING THE COMMONS, *supra* note 14; Blake Hudson, *Federal Constitutions: The Keystone of Nested Commons Governance*, 63 ALA. L. REV. 1007, 1018 (2012) [hereinafter *Federal Constitutions*] (“[T]he lynchpin of Ostrom’s work leading to her 2009 Nobel Prize in Economic Sciences is her robust insight into the circumstances under which groups of individuals have engaged in successful collective action to sustainably manage resources in the absence of private property rights or governmental regulatory intervention.”) (internal citation omitted).

36. Hardin, *supra* note 12, at 1244.

37. *Id.* at 1245 (emphasis added).

*B. Common and Less Common Independent, Rational Free-enterprisers*

The tragedy of the commons has typically been applied to natural resources, such as fisheries, groundwater aquifers, oil and gas resources, wildlife, and forests.<sup>38</sup> Use of these resources may arise in numerous contexts and implicate decision-making processes involving individuals and international, national, and subnational governments.<sup>39</sup> Recently, our understanding of what constitutes a traditional commons has expanded both within and beyond the realm of natural resources. Climate change, for example, has given rise to a host of newly recognized natural resource commons. Several of these pertain to greenhouse gas (GHG) sinks, such as forests and wetlands.<sup>40</sup> Typically, forests and wetlands had been recognized as localized commons with a relatively discrete body of appropriators. The appropriators were defined primarily by their connection to the land upon which the resource was located, and they competed for the direct use of the resource.<sup>41</sup> Climate change is altering the way

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38. See Hudson & Rosenbloom, *supra* note 28, at 1287–90. By observing this trend in commons research, I do not mean to imply that labeling natural resources as commons resources accurately or fully captures important natural resource characteristics. See Jonathan Rosenbloom, *Defining Nature as a Common Pool Resource*, in ENVIRONMENTAL LAW AND CONTRASTING IDEAS OF NATURE: A CONSTRUCTIVIST APPROACH (Keith Hirokawa ed., 2014) (analyzing the intentional and unintentional and positive and negative effects of labeling nature as a “common pool resource”).

39. See Hudson & Rosenbloom, *supra* note 28, at 1292–1314.

40. See Blake Hudson, *Agriculture and Forestry*, in GLOBAL CLIMATE CHANGE AND U.S. LAW (Michael Gerrard & Jody Freeman eds., 2d ed. forthcoming 2013); PETE SMITH ET AL., AGRICULTURE, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 501 (Bert Metz et al. eds., 2007); Viney P. Aneja, et al., *Effects of Agriculture upon the Air Quality and Climate: Research, Policy, and Regulations*, 43 ENVTL. SCI. & TECH. 4234, 4236 (2009).

41. See DAVID N. WEAR & JOHN G. GREIS, U.S. FOREST SERV., THE SOUTHERN FOREST FUTURES PROJECT: SUMMARY REPORT 26–31, 35 (2011) (discussing projected demand of forest products (e.g., land and timber) in the southern United States, as well as the potentially harmful effects of deforestation on watersheds and water quality); *see also* Hudson & Rosenbloom, *supra* note 28, at 1287 (noting that nearly twenty percent of global carbon emissions result from forest degradation) (citing ERIN C. MYERS MADEIRA, POLICIES TO REDUCE EMISSIONS FROM DEFORESTATION AND DEGRADATION (REDD) IN DEVELOPING COUNTRIES 8 (2008)); *see* INT’L UNION FOR CONSERVATION OF NATURE AND NATURAL RES., THE MANAGEMENT OF NATURAL COASTAL CARBON SINKS 39 (Dan Laffoley & Gabriel Grimsditch eds., 2009) (noting that nineteen percent of coral reefs in the world have been lost since 1950, due mainly to human activities); Joy B. Zedler & Suzanne Kercher, *Wetland*

commons scholars view many localized commons. Commons scholars recast these localized commons as part of larger global commons.<sup>42</sup> Actors on the global commons appropriate from a number of resources, including forests, wetlands, and other GHG sinks, which are viewed as part of a global aggregate source serving as a carbon sink and regulating global temperatures.<sup>43</sup> The sum of the localized resources amounts to a worldwide carbon sink that makes it “virtually as fluid and unbounded as fish in the sea.”<sup>44</sup>

As our understanding of the scale of these natural resource commons changes, so too does the scale of the projected actors. The actors on the global commons relevant to GHGs are no longer confined to a localized geographical area. Rather, the actors on these reconfigured commons are global and include municipalities and other appropriators worldwide.<sup>45</sup>

Scholars have identified additional commons resources outside

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*Resources: Status, Trends, Ecosystem Services, and Restorability*, 30 ANN. REV. ENV'T & RESOURCES 39, 55 (2005) (noting that coastal wetlands are sources of carbon sequestration); see also Gail L. Chmura et al., *Global Carbon Sequestration in Tidal, Saline Wetland Soils*, 17 GLOBAL BIOGEOCHEMICAL CYCLES 22-1 (2003) (noting that “[w]etlands represent the largest component of the terrestrial biological carbon pool and thus play an important role in global carbon cycles” (internal citations omitted)); A.H. Hussein et al., *Modeling of Carbon Sequestration in Coastal Marsh Soils*, 68 SOIL SCI. SOC'Y AM. J., 1786, 1786-87 (2004) (noting that coastal marshes are sources of carbon sequestration). North America as a whole has lost over half of its wetlands. See David Moreno-Mateos et al., *Structural and Functional Loss in Restored Wetland Ecosystems*, 10 PUB. LIBRARY OF SCI. BIOLOGY 1, 1 (2012).

42. See generally Elinor Ostrom, *Polycentric Systems for Coping with Collective Action and Global Environmental Change*, 20 GLOBAL ENVTL. CHANGE 550 (2010).

43. Christine Moran Sinclair, Comment, *Global Warming or Not: The Global Climate Is Changing and the United States Should Too*, 28 GA. J. INT'L & COMP. L. 555, 560 (2000) (“Carbon sinks include forests and other natural ecosystems that absorb greenhouse gases from the atmosphere.”) (internal citations omitted).

44. Hudson & Rosenbloom, *supra* note 28, at 1287; see Dietz, Ostrom & Stern, *supra* note 25 at 1908 (stating that “[t]he most important contemporary environmental challenges involve systems that are intrinsically global (e.g., climate change) or are tightly linked to global pressures (e.g., timber production for the world market) and that require governance at levels from the global all the way down to the local”).

45. Upon appropriation, each actor internalizes a benefit (by, for example, draining a wetland to gain more plantable acreage or build a parking lot to incentivize commercial tenants) and externalizes a harm to the global commons and actors thereon in the form of releasing GHGs into the atmosphere. As the number of actors and size of the commons increase, the individual benefit may stay the same, but the individual harm may be diluted as it is spread out even more broadly.

the realm of natural resources. Examples includes diverse subjects, such as medical care, parking spaces, sidewalk vending, knowledge, government budgets, silence, email inboxes, presidential primaries, government structure, creativity, and innovation.<sup>46</sup> Each newly identified commons resource has a corresponding group of new appropriators. These new appropriators—similar to all independent, rational free-enterprisers—are believed to benefit from using the commons, and are expected to act in a manner that will ultimately lead to the ruin of the resource.

### *C. Local Governments as Global Commons Actors*

When local governments are classified as commons actors, commons resource collective action challenges and the associated tragedies could unfold as follows: Any independent, rational local government confronted with an exhaustible and non-excludable resource—a common pool resource—will perceive itself as being in a constant state of rivalry with other local governments over the use of that resource, and will make the rational choice to consume as much of the resource as possible, as quickly as possible, to the ruin of the resource.<sup>47</sup>


The first column in Image 1, below, sets forth examples of potential global commons resources subject to tragic depletion by local governments. Typically, local governments consume these resources in the course of providing key services, set forth in the

46. Hudson & Rosenbloom, *supra* note 28, at 1290 (citing Brigham Daniels, *Governing the Presidential Nomination Commons*, 84 TUL. L. REV. 899 (2010) (discussing presidential primaries)); Brett M. Frischmann, et al., *Constructing Commons in the Cultural Environment*, 95 CORNELL L. REV. 657 (2010) (examining creativity and innovation in various “cultural commons”); Michael Gochfeld, et al., *Medical Care as a Commons*, in PROTECTING THE COMMONS 253 (Joanna Burger et al. eds., 2001).

47. This is not to suggest that ruin is an inevitable outcome. See Rosenbloom, *supra* note 13 (advocating for local government collaboration as a means of avoiding a tragedy); Hudson & Rosenbloom, *supra* note 28, at 1283. See also OSTROM, GOVERNING THE COMMONS, *supra* note 14, at 191 (noting the shortfalls in collective action theories and arguing that they are not useful “for providing a foundation for policy analysis of institutional change in smaller-scale [common pool resources]”); MICHAEL TAYLOR, RATIONALITY AND THE IDEOLOGY OF DISCONNECTION XII (2006); Hari M. Osofsky, *Suburban Climate Change Efforts: Possibilities for Small and Nimble Cities Participating in State, Regional, National, and International Networks*, 22 CORNELL J.L. & PUB. POL’Y 395, 409 (2012).

second column.<sup>48</sup> In managing many of these services, local governments not only regulate the impact of private individuals on the commons, but may also consume a resource unit from the global commons.<sup>49</sup>

**Image 1**

Global Resource	Local Service
Clean fresh water Clean air Forests Terrestrial & coastal wetlands Agricultural resources Oceans Oil Gas Flora Fauna	 Zoning / Land use Potable water Provision & distribution of energy Fire fighting Transportation Waste removal Emergency medical Airports Policing Stormwater management Housing Parks Libraries

48. This is not to suggest that state and national governments do not provide key services, consume common pool resources, or are immune from collective action challenges. See Nives Dolsak et al., *Adaptation to Challenges, in* THE COMMONS IN THE NEW MILLENNIUM 337, 345 (Nives Dolsak & Elinor Ostrom eds., 2003) (noting that the federal structure is such that state governments also are provided with “incentives . . . to place the priorities of their residents over those of the rest of the nation. Virginia’s capacity to meet clean-air standards while its industries contribute considerably to the pollution problems of other states makes it rational for its elected state officials to opt out of pollution agreements to protect the employment and economic growth interests of their constituency.”); Hudson & Rosenbloom, *supra* note 28 (setting forth the structure in which nations, states, and subnational entities may find themselves in collective action challenges).

49. See, e.g., Katherine A. Trisolini, *All Hands on Deck: Local Governments and the Potential for Bidirectional Climate Change Regulation*, 62 STAN. L. REV. 669, 745–46 (2010) (“Local governments have a critical . . . role to play in efforts to reduce greenhouse gas emissions in the United States. The collective potential and the ease of implementation of local policies warrant their serious inclusion in a comprehensive national program.”).

## Prisons &amp; jails

Local governments, for example, “often adopt Euclidean or use-separation zoning, which has been tied to loss of [commons resources] such as clean air [or] biodiversity. . . . Local governments adopt these ordinances notwithstanding the availability of similar ordinances with fewer negative externalities . . . .”<sup>50</sup> In any given jurisdiction, cities not only provide energy and water, but they may also be one of the largest consumers of energy and water, impacting a number of global commons resources.

Local stormwater management policies around the world serve as a good illustration of cities providing a public service that involves the appropriation of a commons resource that crosses international borders. Image 2, below, is a map of cities on the Great Lakes that have a stormwater management policy that incorporates combined sewer outfalls.<sup>51</sup> Employed in 772 local jurisdictions in the United States, combined sewer outfalls or overflows discharge raw sewage and untreated stormwater directly into clean water sources upon certain rain events.<sup>52</sup> Milwaukee, for example, about ninety miles north of Chicago, discharges raw sewage directly into Lake Michigan.<sup>53</sup> The benefits of Milwaukee’s actions are primarily internalized by Milwaukee, as it avoids the cost associated with updating its facilities or considering alternative methods for harvesting or treating rainwater. Chicago and other municipalities bordering Lake Michigan are affected by Milwaukee’s actions as the effluent settles along the shores in their jurisdictions. This led Illinois to sue, alleging that Milwaukee and three other local governments’ use of the water resource resulted in an externalized harm to

50. Rosenbloom, *supra* note 13, at 456 (internal citations omitted).

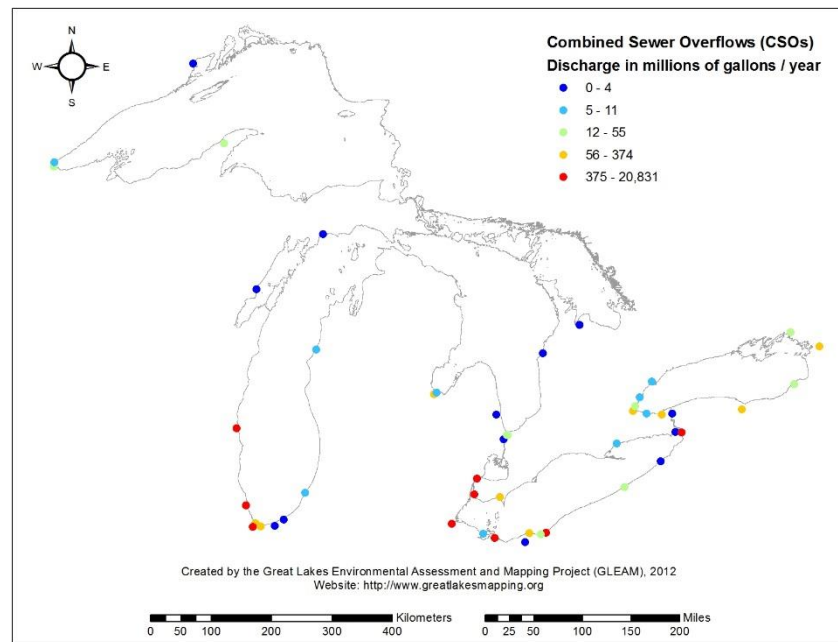
51. Importantly, the map does not include cities that take advantage of tributaries leading to the Great Lakes, even though they may also be consuming resource units in the form of clean water.

52. United States Environmental Protection Agency, *Keeping Raw Sewage & Contaminated Stormwater Out of the Public’s Water*, at 2 (2011), <http://www.epa.gov/region2/water/sewer-report-3-2011.pdf>.

53. For the most up-to-date measurement of gallons of sewage being discharged into Lake Michigan from Milwaukee, see *Overflows*, MILWAUKEE METRO. SEWERAGE DIST., <http://v3.mmsd.com/overflow.aspx> (last visited Aug. 19, 2013) (covering the discharged sewage through CSOs into Lake Michigan from 1992 to 2013).

Chicago and others.<sup>54</sup>

**Image 2**



While Chicago is on the receiving end of Milwaukee's actions, Chicago also contributes to pollution downstream from it. In 1900, Chicago was part of a group that reversed the flow of the Chicago River—a project formerly named the “Chicago Drainage Canal.”<sup>55</sup> Chicago benefited from this significant infrastructure project by

54. *Milwaukee v. Illinois*, 451 U.S. 304 (1981). In its first visit to this case, the Supreme Court denied the motion for leave to file under the Court's original jurisdiction without prejudice. The second action was filed against several local governments, including Milwaukee, Kenosha, Racine, South Milwaukee, the Sewerage Commission of the City of Milwaukee, and the Metropolitan Sewerage Commission of the County of Milwaukee. Brief for Respondent State of Michigan at 3, *Milwaukee*, 451 U.S. 304 (No. 79-408), 1980 WL 339492.

55. J.Q. Dealey Jr., *The Chicago Drainage Canal and St. Lawrence Development*, 23 AM. J. INT'L L. 307, 307 (1929).

ensuring that the sewage it discharged into the river would not end up on its doorstep in Lake Michigan, which also happened to be its primary source of drinking water.<sup>56</sup> With the reversing of the river, the sewage flowed away from Lake Michigan to local governments downstream, such as St. Louis, Missouri.<sup>57</sup> The downstream parties sued, claiming that Chicago's use of the water (i.e., for waste disposal) had negative consequences on them (the plaintiffs claimed, among other things, that typhoid fever in St. Louis increased).<sup>58</sup> The upstream governments—Wisconsin, Michigan, and others—also sued, claiming that Chicago's diversion of the river lowered the water level of Lake Michigan and other waters that are part of the Great Lakes.<sup>59</sup>

The use of shared water sources such as the Great Lakes, Baltic Sea, Danube River (which runs through dozens of cities in Austria, Slovakia, Hungary, Croatia, Serbia, Romania, Bulgaria, Moldova, and Ukraine), Rhine River, Mississippi River, and many others throughout the world is heavily impacted by local decisions. Local communities along these waterways pollute and divert the sources, and adopt a host of regulatory controls that permit lands to be used in a way that results in appropriation of the water sources.<sup>60</sup> These policies

56. *Chicago Wastewater System*, AM. SOC'Y OF CIVIL ENG'RS, <http://www.asce.org/People-and-Projects/Projects/Monuments-of-the-Millennium/Chicago-Wastewater-System/> (last visited Aug. 15, 2013).

57. See Robert V. Percival, *The Clean Water Act and the Demise of the Federal Common Law of Interstate Nuisance*, 55 ALA. L. REV. 717, 720 (2004).

58. *Missouri v. Illinois*, 200 U.S. 496, 523–25 (1906). Interestingly, the Supreme Court suggested that St. Louis filter its water. See *id.* at 525–26.

59. *Wisconsin v. Illinois*, 278 U.S. 367, 407–09 (1929). Disputes involving Great Lakes watersheds, at issue in the *Missouri v. Illinois* and *Wisconsin v. Illinois* cases, continue to be litigated today, including a 2011 Seventh Circuit Court of Appeals decision. *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765 (7th Cir. 2011), *cert. denied*, 132 S. Ct. 1635 (2012) (affirming the denial of a preliminary injunction requested by states bordering the Great Lakes to compel the Army Corps of Engineers and the Metropolitan Water Reclamation District of Greater Chicago to take additional measures to prevent the spread of “Asian carp” through the Chicago Area Waterway System into Lake Michigan).

60. Local actions involve, for example, zoning that permits cultivation up to a river's edge with no buffer strips, tiling and the rapid removal of water from the ground, and permitting the use of fertilizer that is replete with nitrates and phosphates. Tiling is a practice that has been used for over 100 years and involves a subsurface drainage system designed to quickly remove water from one jurisdiction or site to the next. D.B. Jaynes & D.E. James, *The Extent of Farm Drainage in the United States*, available at <http://www.ars.usda.gov>



contribute to drought conditions upstream, flooding downstream, and increased pesticides, chlorophyll, and nutrient overloads in water sources, which exacerbate dead zone conditions hundreds of miles away in places like the Gulf of Mexico and Baltic Sea.<sup>61</sup>

In each example, several actors, including local governments, make decisions to consume global resources.<sup>62</sup> In Lake Michigan, each local government can use or appropriate clean water, but may not stop others from doing so. Clean water is “exhaustible” in both quality (as raised by Missouri)<sup>63</sup> and quantity (as raised by Wisconsin).<sup>64</sup> Continuing the application of Hardin’s commons analysis, each local government’s appropriation of clean water results in the internalization of a benefit and an externalization of a cost associated with that appropriation. While some resources are wholly confined within a national border, these water resources and other resources (such as the atmosphere) freely flow from one national jurisdiction to another.

The examples above are emblematic of local policies that implicate global resources. Scholarship discussing the connection between common pool resources and local governments focuses on the dissection of a given resource to determine whether it is depletable and non-excludable, such that it qualifies as a common

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61. *See, e.g.*, Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997, para. 40 (noting, among other impacts, increased frequency of flooding, siltation, eutrophication, and extinction of fluvial fauna and flora); *see also* Pakootas v. Teck Cominco Metals, 452 F.3d 1066, 1069–70 (9th Cir. 2006). *See* STEPHEN MCCAFFREY & RACHAEL SALCIDO, GLOBAL ISSUES IN ENVIRONMENTAL LAW 96–100 (West 2009) (arguing/showing that local governments in Switzerland, Germany, France, Luxemburg, and the Netherlands also compete for clean water flowing through the Rhine River).

62. There is nothing in the tragedy of the commons analysis requiring mobility of the actors and not the resource. In Hardin’s analysis, the pasture was stationary and the herders moved around the commons, but that does not have to be the case. *See* Federal Constitutions, *supra* note 35, at 1031.

63. *Missouri v. Illinois*, 200 U.S. 496, 517 (1906) (noting that Missouri’s claim is rooted in the upstream discharge of “poisonous filth” impacting the quality of water “upon which various of the plaintiff’s cities, towns, and inhabitants depended, as to make it unfit for drinking, agricultural, or manufacturing purposes”).

64. *Wisconsin v. Illinois*, 278 U.S. 367, 407–09 (1929) (plaintiff Wisconsin based its cause of action on Illinois’ diversion of water from the Great Lakes, which lowered the lake water levels).

pool resource.<sup>65</sup> In doing so, the literature continues to recognize a growing list of common pool resources in which local governments are actors, including transportation,<sup>66</sup> clean water,<sup>67</sup> urban sprawl,<sup>68</sup> land use generally,<sup>69</sup> hydrofracking,<sup>70</sup> renewable energy,<sup>71</sup> building and construction,<sup>72</sup> roads,<sup>73</sup> streets, parks, sidewalks, vacant properties,<sup>74</sup> property tax,<sup>75</sup> neighborhood aesthetics,<sup>76</sup> urban agriculture,<sup>77</sup> and housing.<sup>78</sup>

Although the scholarship applies the tragedy of the commons to local governments, it is assumed, without discussion, that local governments are “independent, rational, free-enterprisers,” analogous to Hardin’s herders. Part III tests this assumption by exploring the unique legal and institutional restrictions applicable to

65. See, e.g., Foster, *supra* note 19, at 58–61 (identifying various “urban commons,” such as streets, parks, and sidewalks, and discussing their “nonexcludable, rivalrous” nature); Merrill, *supra* note 18, at 979–88 (discussing various regulations and sources of pollution and determining whether a “commons problem” is present); Sarah B. Schindler, *Following Industry’s LEED®: Municipal Adoption of Private Green Building Standards*, 62 FLA. L. REV. 285 (2010) (land use); Trisolini, *supra* note 49 (discussing climate change).

66. See Orlyn O. Lockard, III, Note, *Solving the “Tragedy”: Transportation, Pollution and Regionalism in Atlanta*, 19 VA. ENVTL. L.J. 161, 178–81 (2000).

67. See Merrill, *supra* note 18.

68. See Katharine J. Jackson, *The Need for Regional Management of Growth: Boulder, Colorado as a Case Study*, 37 URB. LAW. 299, 317, 322 (2005).

69. See Schindler, *supra* note 65.

70. See Emily C. Powers, *Fracking and Federalism: Support for an Adaptive Approach that Avoids the Tragedy of the Regulatory Commons*, 19 J.L. & POL’Y 913, 913 (2011).

71. See Hannah Wiseman, *Expanding Regional Renewable Governance*, 35 HARV. ENVTL. L. REV. 477 (2011).

72. See Rachael Rawlins & Robert Paterson, *Sustainable Buildings and Communities: Climate Change and the Case for Federal Standards*, 19 CORNELL J.L. & PUB. POL’Y 335 (2010).

73. See Michael L. Stokes, *Access Management: Balancing Public and Private Rights in the Modern “Commons” of the Roadway*, 60 CLEV. ST. L. REV. 585 (2012).

74. See Foster, *supra* note 19.

75. See Michael Gervais & Dontae Rayford, Comment, *In Pursuit of Equity in Property Tax Allocation: Discussing the Flawed Implementation of Proposition 13*, 30 VA. TAX REV. 761 (2011).

76. See Amnon Lehavi, *Is Law Unbounded? Property Rights and Control of Social Groupings*, 35 LAW & SOC. INQUIRY 517 (2010).

77. See Dana May Christensen, *Securing the Momentum: Could a Homestead Act Help Sustain Detroit Urban Agriculture?*, 16 DRAKE J. AGRIC. L. 241 (2011).

78. See Andrea Boyack, *Community Collateral Damage: A Question of Priorities*, 43 LOY. U. CHI. L.J. 53 (2011).

local governments and by showing that local governments may want to preserve commons resources (and thus, act irrationally), but are not free to do so. First, however, the next Part reviews the unique place local governments have in the institutional framework and the legal restrictions applicable to local governments.

## II. LOCAL GOVERNMENTS' PLACE IN A MULTI-LAYERED INSTITUTIONAL FRAMEWORK

Lost in the application of the tragedy of the commons analysis to numerous new contexts is the importance and influence of existing legal and institutional structures that may affect commons actors' behavior and interfere with their ability to sustainably manage commons resources. Unlike Hardin's private sector actors, local governments may not have the legal authority to engage in a variety of irrational actions because they are subject to legal and institutional arrangements that are not applicable to individuals and that curtail their decision making. For example, each local government situated along an international waterway may operate under a different set of international and national laws (and subnational laws, although not analyzed here) that limit cities' ability to sustainably manage the resource.

This Part describes the legal doctrines dividing authority among the international, national, and subnational actors, such as the charter of the United Nations, which divides authority between national and global governments, or the Commerce Clause in the U.S. Constitution, which divides authority between state and national governments. This Part focuses on describing which legal doctrines divide authority among the actors and alter local government decision making on the commons.

A significant amount of research outside the realm of commons resource scholarship identifies challenges stemming from the division of authority among the various levels of government.<sup>79</sup> These

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79. See, e.g., David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255 (2003); Laurie Reynolds, *Home Rule, Extraterritorial Impact, and the Region*, 86 DENV. U. L. REV. 1271, 1294–1302 (2009); Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 130 (2005) (analyzing authority distributions between state and federal governments).

scholars set forth the intended and unintended consequences of dividing authority among levels of government.<sup>80</sup> For example, authors critically note the negative impacts “home rule” and state preemption laws—which divide authority between state and local governments in the U.S.—have on affordable housing, economic development, and land-use planning.<sup>81</sup> Within the context of commons research, scholars have also explored the proper level at which to manage commons resources.<sup>82</sup> A number of scholars note that some issues, such as climate change, require action at all levels, while other scholars advocate for international action, and still others for local action.<sup>83</sup>

Combining and building off existing lines of scholarship, Blake Hudson and I explored how one level of government’s authority to manage a commons resource “may nonetheless remain in a tragic plight due to the allocation of governance authority in federal

80. See, e.g., Reynolds, *supra* note 79, at 1297–1302 (analyzing how judicial interpretation of provisions dividing power between state and local governments impacts local governance).

81. See Barron, *supra* note 79, at 2337–45; Reynolds, *supra* note 79, at 1297–1302.

82. Compare Hari M. Osofsky, *Diagonal Federalism and Climate Change: Implications for the Obama Administration*, 62 ALA. L. REV. 237, 241 (2011) (advocating “diagonal federalism,” which seeks to “incorporate key public and private actors at different levels of government (the vertical piece) and within each level of government (the horizontal piece) simultaneously in order to create needed crosscutting interactions”); BARRY G. RABE, STATEHOUSE AND GREENHOUSE: THE EMERGING POLITICS OF AMERICAN CLIMATE CHANGE POLICY 1–37 (2004) (exploring state actions); Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863 (2006); Robert B. Ahdieh, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination*, 73 MO. L. REV. 1185 (2008); Robert B. Ahdieh, *From Federalism to Intersystemic Governance: The Changing Nature of Modern Jurisdiction*, 57 EMORY L.J. 1 (2007); Robert B. Ahdieh, *When Subnational Meets International: The Politics and Place of Cities, States, and Provinces in the World*, 102 AM. SOC’Y INT’L L. PROC. 339 (2008), with David E. Adelman & Kirsten H. Engel, *Reorienting State Climate Change Policies to Induce Technological Change*, 50 ARIZ. L. REV. 835 (2008); Kirsten Engel, *State and Local Climate Change Initiatives: What Is Motivating State and Local Governments to Address a Global Problem and What Does this Say About Federalism and Environmental Law?*, 38 URB. LAW. 1015 (2006); David R. Hodas, *State Law Responses to Global Warming: Is It Constitutional to Think Globally and Act Locally?*, 21 PACE ENVTL. L. REV. 53 (2003); Alice Kaswan, *Climate Change, Consumption, and Cities*, 36 FORDHAM URB. L.J. 253 (2009); Richard B. Stewart, *States and Cities as Actors in Global Climate Regulation: Unitary vs. Plural Architectures*, 50 ARIZ. L. REV. 681 (2008).

83. See, e.g., Osofsky, *supra* note 82; Adelman & Engel, *supra* note 82; Stewart, *supra* note 82.

systems—an allocation that may or may not legally entrench the commons dynamic.”<sup>84</sup> We set out to detail the multiple legal influences that exist in a federal system of governance. Our objective was to establish a theoretical framework to depict and understand the dynamic between the division of authority among multiple levels of government and commons resource management.

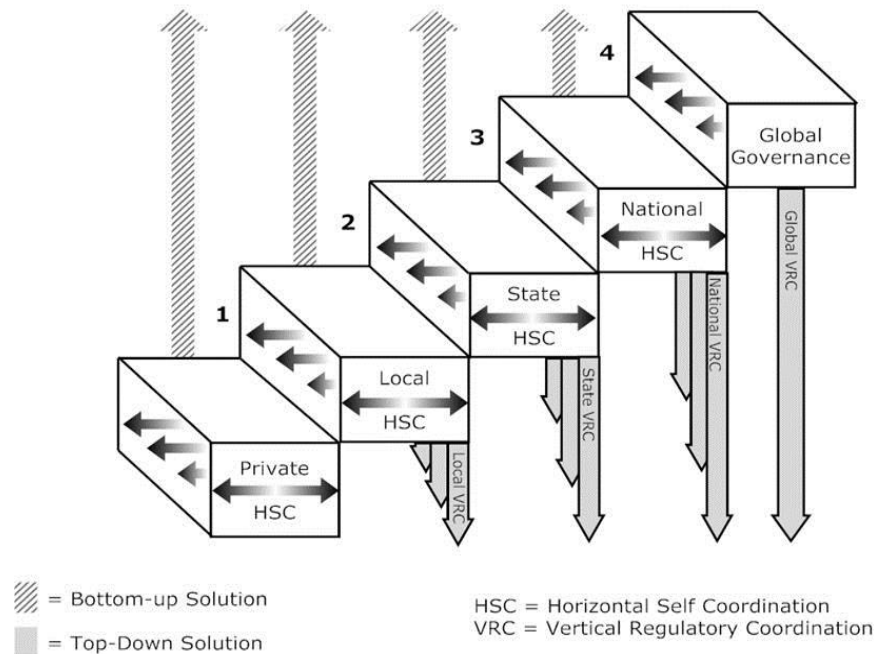
Our deconstruction of the layers of government led us to two observations. First, a single source of natural capital may exist in multiple commons at multiple times.<sup>85</sup> Second, within each level of government we found a number of legal restrictions and political action scenarios that could alter commons dilemmas occurring at different layers.<sup>86</sup> Based on these two findings (multiple concurrent commons and geolegal/geopolitical influences), we designed the multi-layer institutional structure in which the various levels of government exist as a three-dimensional commons problem, reproduced in Image 3 below. At each level, numerous actors appropriate from a single natural capital commons, however, the actors are subject to different legal and political influences that may encourage or discourage sustainable management of the resource.

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84. Hudson & Rosenbloom, *supra* note 28, at 1273.

85. *Id.* at 1292.

86. *Id.* at 1273.

**Image 3**<sup>87</sup>**Governance/Management Options  
Across Nested Commons Scales**

Particularly relevant here, at the local level a global collective action challenge, such as climate change, may be subject to numerous vertical regulatory actions in the form of a global governance policy, varying national policies, and numerous state policies. Further, because national and state policies may differ by jurisdiction, each local entity may be operating under a different set of influences that will alter its decision making relative to the atmospheric resource. For example, cities in Italy are subject to different “regional” (the equivalent of which would be states in the U.S.)<sup>88</sup> and national policies relevant to climate change from those

87. *Id.* at 1338.

88. Regions are constitutionally empowered and recognized by the Constitution of Italy. Art. 123 Costituzione [Cost.] (It.) (“Each Region shall have a statute which, in compliance with the Constitution, shall lay down the form of government and basic principles

cities in the U.S. Rome would be subject to Italian national policies, as well as Lazio regional policies, while Seattle would be subject to U.S. national and Washington State policies.<sup>89</sup> Further, both may be subject to international restrictions, however, that too may vary depending on whether Italy or the U.S. has ratified a given treaty or joined a multi-national regional treaty, such as the European Union. Alternatively, subnational entities may seek to horizontally coordinate, so long as they have the international and national authority to do so (the primary focus in Part III), adding an additional governance layer. Examples of such coordination by U.S. states and Canadian provinces include the Western Climate Initiative (among California, British Columbia, and Quebec), the Regional Greenhouse Gas Initiative (among Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont), and the Pacific Coast Collaborative (Alaska, British Columbia, California, Oregon, and Washington).

### III. DISSECTING THE MULTI-LAYERED INSTITUTIONAL FRAMEWORK AND ITS EFFECTS ON LOCAL GOVERNMENT DECISION MAKING

This Part examines the influence international and national legal restrictions can have on local governments' ability to manage commons resources. For example, how does international and national law impact a city's decision to promote economic development and attract businesses, investment, and cultural activities by lowering barriers that protect natural capital? Likewise, why would a city adopt lax land use, wetland, or forest management standards or reduce regulatory steps, making it easier and less expensive to consume commons resources? While these actions may lower short-term costs for private investors, they may also involve the consumption of global commons resources and lead to potentially tragic aggregate results.

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for the organization of the Region and the conduct of its business. The statute shall regulate the right to initiate legislation and promote referenda on the laws and administrative measures of the Region as well as the publication of laws and of regional regulations.”).

89. This system will change on January 1, 2015 when Rome and several other cities will become “Città Metropolitana,” creating a new local, quasi-regional authority under Italian law. Legge 16 aprile 2014, n. 56 (It.).

This Part illustrates how the legal restrictions that empower or disempower each level of government, such as the charter of the United Nations and the Commerce Clause in the U.S. Constitution, limit local governments' ability to sustainably manage commons resources. This is not to say that other legal restrictions (what I call "substantive legal restrictions" to distinguish them from those dividing authority and setting the parameters of the institutional framework), such as the Kyoto Protocol, the Clean Air Act, California's Global Warming Solutions Act (AB 32), have no effect on collective action challenges facing local governments. They clearly do. The substantive restrictions are the result of each level of government exercising authority it has been granted pursuant to the institutional framework. For that reason, it is first important to explore the legal authority each level of government has to act, and how the grant of authority to one level of government impacts local governments. In other words, to obtain a more complete understanding of the legal rules that may affect local governments, it is first critical to understand the multi-layered institutional framework that authorizes each level to enact substantive legal restrictions. For example, this Part will not explore the Clean Air Act (a substantive legal restriction), but will explore the Commerce Clause, which empowered the federal government to enact the Clean Air Act.<sup>90</sup>

When local governments are empowered to address a particular commons issue, they must do so within the confines of the multi-layered institutional framework set forth in Image 3 above.<sup>91</sup> Within this framework, local governments are subject to international, national, and state vertical regulatory power. In addition, they may

90. See, e.g., *United States v. Ho*, 311 F.3d 589, 601 (5th Cir. 2002) (upholding Clean Air Act asbestos removal regulation against Commerce Clause challenge); Jeanine A. Scalero, *The Endangered Species Act's Application to Isolated Species: A Substantial Effect on Interstate Commerce?*, 3 CHAP. L. REV. 317, 318 (2000) ("The constitutional basis for many environmental statutes . . . is the Commerce Clause.").

91. See generally Gerald E. Frug & David J. Barron, *International Local Government Law*, 38 URB. LAW. 1 (2006) ("Cities are not free to do whatever they please. They can exercise power only within the legal frameworks that others have created for them."). See also Osofsky, *supra* note 47, at 406 ("Local action in climate change takes place in a broader context of debates over international, national, and state action.").



be influenced by a number of horizontal actions taken at multiple levels, including international and national. Thus, whether and how local governments may act is dependent upon the legal structures that helped create the other levels. The following two sections detail the impacts the international and national laws empowering each level, respectively, have on local governments' decisions relative to global commons resources.

*A. International Layer*

In their foundational piece on international local government law, Gerald Frug and David Barron stated that there are two predominant viewpoints from which to consider the legal restrictions governing local governments acting internationally.<sup>92</sup> First, from a comparative standpoint, local governments are viewed through the lens of the different national legal restrictions governing them.<sup>93</sup> Second, from a globalization standpoint, local governments are viewed as global actors in their own right on the international stage.<sup>94</sup>

Exploring local governments' actions relative to global commons resources requires an analysis of both the comparative and globalization perspectives Frug and Barron identify. Highlighting the geolegal differences among nations and their impacts on the commons captures a comparative analysis. It acknowledges that there are differences among nations in terms of how they view and empower local governments. A comparative approach acknowledges that those differences authorize local governments to act in different ways, which could impact their decisions when confronting global commons resources. The globalization approach accounts for the far-reaching impact local governments and urban centers may have. Further, a globalization approach helps recognize local governments' involvement in the consumption of global commons resources.

Observing local governments in both a comparative and globalization context necessitates an understanding of the relevant legal restrictions that empower international bodies. Those restrictions derive from 1) international agreements formed under

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92. Frug & Barron, *supra* note 91, at 5.

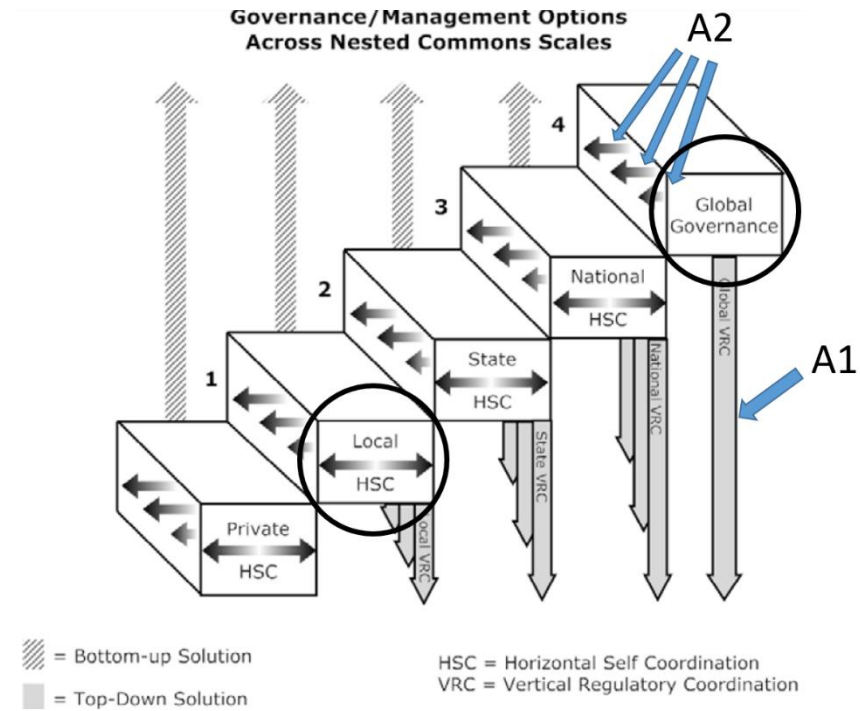
93. *Id.*

94. *Id.*

the auspices of United Nations treaties or customary international law, or 2) vertical or horizontal bilateral or multi-national (regional) agreements among nations. Actions at either the global or sub-global level may occur through vertical regulation depicted in A1 in Image 4, below, or horizontal agreements, as depicted in A2, below. The following two subsections dissect the impacts these vertical (A1) and horizontal (A2) regulations have on local governments; first when taken by the U.N. and then when taken by regional bodies.<sup>95</sup>

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95. An A2 scenario would be a collaboration of international organizations, such as the World Bank collaborating with the World Health Organization and/or the Food and Agriculture Organization.

**Image 4**

### *1. Agreements formulated under the auspices of the United Nations*

Yishai Blank clearly sets forth the status of local governments under international treaties and customary international law:

[L]ocal governments have no legal personality in formal international law. Classic documents of international law . . . do not recognize localities as possessing legal person. No international treaty or convention of the UN, and almost no decision of the International Court of Justice . . . mentions the existence of localities or recognizes them as legal entities under international law.<sup>96</sup>

<sup>96</sup> Yishai Blank, *The City and the World*, 44 COLUM. J. TRANSNAT'L L. 875, 892 (2006).

The U.N. Charter, for example, which created and empowered the modern form of international law,<sup>97</sup> does not mention cities and notes that “[n]othing . . . shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.”<sup>98</sup> While there are varying perspectives on what this provision means and whether traditional notions of sovereignty are changing, under international law, only nation states may cede sovereignty.<sup>99</sup> Further, only nations—and not local governments—have standing to sue in the International Court of Justice,<sup>100</sup> only nations can be members of the U.N., and only nations can be parties to treaties negotiated under the auspices of the U.N.<sup>101</sup>

International law is predominantly focused on the relationship between and among nations.<sup>102</sup> Local governments and their authority to act are viewed as domestic matters beyond the purview

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97. U.N. Charter Preamble, *available at* <http://www.un.org/en/documents/charter/preamble.shtml> (“Accordingly, our respective Governments . . . have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.”).

98. *Id.* at art. 2, para. 7. For a discussion as to why local governments are not recognized under international law, see Blank, *supra* note 96, at 892–94.

99. See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 316–18 (1936) (stating that subnational entities may not cede national sovereignty); MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 162–63 (4th ed. 2003) (“Sovereignty was the crucial element in the peace treaties of Westphalia . . . [T]he key actor on the world’s stage was the sovereign state to which all loyalty was due internally and which was unrestrained externally.”). For a discussion of local governments’ expanded role over national sovereignty, see EARL H. FRY, THE EXPANDING ROLE OF STATE AND LOCAL GOVERNMENTS IN U.S. FOREIGN AFFAIRS 23 (1998); Yishai Blank, *Localism in the New Global Legal Order*, 47 HARV. INT’L L.J. 263, 268 (2006); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT’L L. 1 (2002).

100. Statute of the International Court of Justice, art. 34 (“Only states may be parties in cases before the Court.”).

101. U.N. Charter art. 4, para. 1.

102. See Austen L. Parrish, *Changing Territoriality, Fading Sovereignty, and the Development of Indigenous Rights*, 31 AM. INDIAN L. REV. 291, 293 (2006) (“Until recently, international law largely focused on state-to-state relations and the rights and obligations of states”). *But see* Frug & Barron, *supra* note 91, at 25–26 (noting a U.N. commissioned report suggesting U.N. agencies work closely with local authorities and the General Assembly debate a resolution to respect local autonomy); Blank, *supra* note 96, at 909–11 (noting a number of U.N.-initiated programs designed to engage local governments).

of international law.<sup>103</sup> At the domestic level, however, norms of international law dictate that nations may not take actions that have transnational impacts.<sup>104</sup> A nation—and therefore, local governments within the nation—may not adopt policies that attempt to regulate extraterritorially.<sup>105</sup> That said, each nation has a right to devise its own subnational structure, and international law has influence over how it is devised only to the extent that each nation state specifically cedes that authority.<sup>106</sup> While there have been a number of attempts to include local governments in U.N.-related activities, the predominant view remains that local governments have little formal recognition under international law.

## *2. Bilateral or multi-national (regional) agreements among nations*

In addition to the U.N. Charter and customary international law, several international agreements convey authority to regional bodies. These bodies are comprised of multiple nations, but are not open to all nations. While each of these agreements consists of differing provisions, a unifying theme among the agreements is their focus on national—and not local—boundaries and authority.

For example, the European Union (EU), which is comprised of twenty-eight European states, contains over 91,000 local governments.<sup>107</sup> These local governments, however, have limited authority under EU law. While local governments are often tasked

103. Frug & Barron, *supra* note 91, at 2, 12–13 (“The relationship between a sovereign state and its cities has traditionally been considered an internal domestic matter—the type of issue that is outside the orbit of international law.”).

104. Parrish, *supra* note 102, at 295–96 (“Power ended at the border; domestic law applied only within state borders to peoples within the state . . . . So long as a state did not cause harm outside its territory, international law had little to say about what a state did internally.”).

105. See Parrish, *supra* note 102, at 295–96.

106. *Id.*; IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 288 (6th ed. 2003).

107. See Comm. of the Regions, *The Role and Impact of Local and Regional Authorities within the European Union* 3, Feb. 2009, available at [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_307\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_307_en.pdf) (published in 2009, the report states that there are twenty-seven EU member states; Croatia became the twenty-eighth EU member country in 2013, [http://europa.eu/about-eu/countries/member-countries/croatia/index\\_en.htm](http://europa.eu/about-eu/countries/member-countries/croatia/index_en.htm)). France alone has over 36,000 “communes,” which are analogous to cities in the U.S. See Andrew West, *Reforming Regional and Local Government in France* (2014) (on file with author).

with implementing EU legislation,<sup>108</sup> they have limited authority to challenge that legislation.<sup>109</sup> The Court of Justice of the European Union (CJEU) has made clear that the EU, as an international organization, serves the national—and not local—governments.<sup>110</sup> Further, the CJEU has refused to grant standing to local actors, recognizing only member states and agencies of the EU.<sup>111</sup> As one author concluded, local governments are “invisible” to the EU.<sup>112</sup> While EU cities may not file suit with the CJEU, the CJEU has permitted suits *against* local governments when city ordinances conflict with international EU policy.<sup>113</sup>

Local governments also have little authority in legislating or regulating international issues, such as those involving global commons resources. The European Commission, the key executive entity of the EU, is responsible for managing day-to-day operations and for drafting EU laws.<sup>114</sup> The Commission is comprised of twenty-eight members, one for each European state, which are nominated by nations (subject to an EU approval process).<sup>115</sup> Whether nations consult local governments is an internal matter, but is not required pursuant to the Treaty on European Union or general EU law. During the legislative drafting process, the Commission is to consult with those affected by legislation, including local governments through the Committee of Regions

108. See RALPH H. FOLSOM, *PRINCIPLES OF EUROPEAN UNION LAW* 37 (3d ed. 2011) (suggesting that national and local governments are responsible for the implementation of approximately three-quarters of the legislation passed in the EU).

109. Fernanda Nicola, *Invisible Cities in Europe*, 35 *FORDHAM INT'L L.J.* 1282, 1291–93 (2012).

110. *Id.* at 1289. (“On several occasions, the CJEU has expressed its reluctance to intervene in state-local matters by failing to recognize the authority of local actors to act independently from their respective Member States.”).

111. *Id.* at 1286, 1292 (citing Consolidated Version of the Treaty on the Functioning of the European Union art. 263, 2010 O.J. (C 83/47) 162); Consolidated Version of the Treaty on the Functioning of the European Union art. 5, Dec. 1, 2009, 2012 O.J. (C 326) 1818, available at [http://www.ecb.europa.eu/ecb/legal/pdf/c\\_32620121026en.pdf](http://www.ecb.europa.eu/ecb/legal/pdf/c_32620121026en.pdf) [hereinafter TFEU].

112. *Id.* Nicola, *supra* note 109, at 1286.

113. *Id.* at 1291–92.

114. Consolidated Version of the Treaty on European Union art. 17, Feb. 7, 1992, 2012 O.J. (C 326) [hereinafter Treaty on European Union].

115. *Id.*

(CR).<sup>116</sup> Established by TFEU and amended in the Lisbon Treaty of 2007,<sup>117</sup> the CR is a committee within the EU that is consulted by the European Parliament, European Council, and Commission when those bodies create legislation affecting localities.<sup>118</sup> While the CR does not have a substantive vote on the legislation, it is designed to ensure local governments have a voice in EU legislation, particularly when it impacts them.<sup>119</sup> And, when relevant, the CR has the authority to assert its rights at the Court of Justice of the European Union.

### 3. *International legal restrictions and impact on local governments*

The laws set forth above in subsections 1 and 2 help divide power principally between international and national governments. They empower international bodies and establish a framework in which international law exists. In doing so, the legal restrictions have a number of effects on local governments and their ability to

116. Treaty of Lisbon, Protocol on the Application of the Principles of Subsidiarity and Proportionality art. 2, Dec. 13, 2007, 2007 O.J. (C 306) 151–152. The Committee of the Regions is comprised of 353 members who are appointed to a five-year term by the European Council. *Committee of the Regions*, EUROPA, available at [http://europa.eu/about-eu/institutions-bodies/cor/index\\_en.htm](http://europa.eu/about-eu/institutions-bodies/cor/index_en.htm) (last visited Sept. 25, 2014). The members include regional presidents, mayors, or elected representatives from the twenty-eight EU member states. *Key facts*, EUROPA, available at <http://cor.europa.eu/en/about/Pages/key-facts.aspx> (last visited Mar. 24, 2015). The selection of the members varies from country to country, as each nation is responsible for appointing their own representatives, and the European Council determines the number of representatives each member state is granted. *The Selection Process for the Committee of the Regions Members: Procedures in the Member States* 3, EUROPA, (2009), available at <http://cor.europa.eu/en/Archived/Documents/840ed860-60ca-4af6-8be9-70b795f42207.pdf>. See *id.* at 3–4, n.4 (providing the distribution for the 353 members of the Committee of Regions to be: Belgium – 12, Czech Republic – 12, Denmark – 9, Germany – 24, Estonia – 7, Greece – 12, Spain – 21, France – 24, Malta – 5, Netherlands – 12, Austria – 12, Poland – 21, Portugal – 12, Slovenia – 7, Slovakia – 9, Finland – 9, Sweden – 12, United Kingdom – 24, Bulgaria – 12, Romania – 15).

117. TFEU arts. 305–07.

118. TFEU art. 307; see RALPH H. FOLSOM, *PRINCIPLES OF EUROPEAN UNION LAW* 37 (3d ed. 2011); Treaty of Lisbon arts. 2–3 (“Before proposing legislative acts, the Commission shall consult widely. Such consultations shall, where appropriate, take into account the regional and local dimension of the action envisaged. . . . For the purposes of this Protocol, ‘draft legislative acts’ shall mean proposals from the Commission.”).

119. Comm. of the Regions, *The Role and Impact of Local and Regional Authorities within the European Union* 3, Feb. 2009, available at [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_307\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_307_en.pdf).

sustainably manage global commons resources. This subsection explores two legal restrictions that illustrate how the division of authority between international and national bodies may have a profound impact on local governments: (1) local governments' actions may not have transnational impacts, and (2) local governments may have their sovereignty breached by international law, but have little, if any, right to protect that sovereignty under international law.

To explore these two areas, assume cities from around the world agree to form an emissions trading initiative similar to the EU Emissions Trading System or the Western Climate Initiative, except instead of nations or states, the initiative is among local governments. In the hope of having a cumulative effect on the atmospheric commons and reducing greenhouse gas emissions, assume the local governments collaborate in a manner that self-regulates their collective use of the commons resource.<sup>120</sup> Assume they also seek binding agreements to minimize leakage and reduce the temptation to free ride, thereby sustainably and collectively managing the commons resource.

At first glance, the hypothetical emissions trading initiative may appear similar to a number of local government organizations, including the U.S. Conference of Mayors (Climate Protection Agreement), C-40 Cities Climate Leadership Group, United Cities & Local Governments, or ICLEI—Local Governments for Sustainability.<sup>121</sup> Those organizations, however, do not require

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120. For examples of successful collective management of commons resources see OSTRUM, *GOVERNING THE COMMONS*, *supra* note 14; Rosenbloom, *supra* note 13 (discussing theoretical, but not legal, possibilities for local government collaboration). A collaborative comprised of the ten most populous world cities would represent the eighth largest country in the world, while a collaborative of the top twenty would be the fourth largest, behind only China, India, and the U.S. The cumulative impact of these cities could help avoid the tragic depletion of vital resources. *Countries of the World*, WORLDATLAS, <http://www.worldatlas.com/aatlas/populations/ctypopls.htm> (last visited Mar. 24, 2015); *List of Cities Proper by Population*, WIKIPEDIA, [http://en.wikipedia.org/wiki/List\\_of\\_cities\\_proper\\_by\\_population](http://en.wikipedia.org/wiki/List_of_cities_proper_by_population) (last visited Mar. 24, 2015).

121. *The U.S. Mayors Climate Protection Agreement*, U.S. MAYORS (2005), <http://www.usmayors.org/climateprotection/documents/mcpAgreement.pdf>; *Climate*, C40CITIES, <http://www.c40.org/> (last visited Mar. 24, 2014); *About*, UCLG, <http://www.uclg.org/en/organisation/about> (last visited Nov. 6, 2014) (“UCLG’s work programme focuses on . . . [i]ncreasing the role and influence of local government and its



binding obligations on behalf of the participating cities.<sup>122</sup> The primary question confronted here and through the hypothetical emissions trading initiative is whether local governments have the legal authority to enter into binding agreements under international law (and federal law as viewed in the next section).

When analyzed in light of the legal restrictions set forth in the two prior subsections, the trading initiative may be beyond local governments' purview, and—in turn—may limit local governments' ability to manage key commons resources. As a starting point, local governments are not free to enter into binding international treaties. Local governments have no legal authority to bind nation-states and may not enforce treaties under international law. As one author noted, "[a]t the end of the twentieth century as at the end of the eighteenth, as regards U.S. foreign relations, [state governments in the U.S.] 'do not exist'."<sup>123</sup> If U.S. states have no right to enter into enforceable multi-jurisdictional collaborations like the trading system, U.S. local governments—as purely creations of state law—do not either.

Relatedly, pursuant to international law, nations may not have transnational impacts. Local ordinances must be purely local, confined to the host country. Because local governments may not regulate beyond national borders, they are limited in their ability to address global commons challenges. If a particular issue implicates a global commons resource, any attempt to regulate it would require the local government to have a transnational impact. A local government could certainly attempt to regulate the use of resources within its jurisdiction (as many cities have); however, to do so would be against a city's economic interest in that the majority of its actions

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representative organisations in global governance"); *Sustainable City*, ICLEI, <http://www.iclei.org/our-activities/our-agendas/sustainable-city.html> (last visited Nov. 6, 2014).

122. An interesting issue beyond the purview of this Article is what form that legally binding obligation would take. For example, it could be contractual and enforced by local governments, individually or collectively, much like covenants in a homeowners' association, or could include ceding authority to an international, third-party body devised of local governments. Importantly, for any of the potential forms, local governments would need the legal authority to enter into the necessary agreements.

123. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 150 (2d ed. 1996).

would be shared among cities around the world. For example, Stockholm's actions to reduce its carbon emissions are attempts to lower atmospheric GHGs and reduce climate change.<sup>124</sup> Because the atmosphere is a shared resource among all cities, Stockholm absorbs the cost of its actions, but shares the benefits of its actions with all cities. In essence, this is the opposite of the free rider: Stockholm is the paying non-rider or the "full-fare rider."<sup>125</sup>

Motivated by economic self-interest, Hardin's actors in the *Tragedy of the Commons* identify an economic self-interest built around an internalized benefit and an externalized harm. Hardin's actors assume a self-interested position.<sup>126</sup> Similar to Hardin's actors, cities may appear to act in their self-interest, but they may not be motivated solely by economic interests. Rather, they are "motivated," or compelled, by international law that limits their ability to have transnational impacts. This limitation encourages local governments to adopt a self-preservation position that parallels Hardin's actors. Because global commons resources are by definition multi-jurisdictional, any attempt to address them may be prohibited, restricted, or at a minimum discouraged under international law and the limitation on transnational impacts.<sup>127</sup>

Not only are local governments prohibited from having a transnational impact (and presumably protected from other cities having a transnational impact), but also they have no recognized right to enter into binding agreements with other cities to form collectives and avoid tragedies in a manner similar to that observed by Elinor Ostrom. As stated above, nations, such as those in the EU, may cede authority to an international body, which can compel local

124. For a description of some of Stockholm's climate initiatives see STOCKHOLM ENV'T AND HEALTH DEP'T, STOCKHOLM ACTION PLAN FOR CLIMATE AND ENERGY 2010-2020, available at [http://mycovenant.eumayors.eu/docs/seap/316\\_1315931348.pdf](http://mycovenant.eumayors.eu/docs/seap/316_1315931348.pdf).

125. See John C.P. Goldberg, *Tribute*, 64 VAND. L. REV. 1409, 1412 (2011).

126. Hardin, *supra* note 12, at 1244.

127. See Rosenbloom, *supra* note 13, at 453 n.34 ("Although not involving a municipality, the U.S. Supreme Court's decision in *Wickard v. Filburn*, 317 U.S. 111 (1942), is instructive. In that case, the Supreme Court ruled that a farmer 'affect[s]' commerce by consuming his own crops and not selling them. *Id.* at 124-28. If an individual farmer growing and consuming crops on his own land can have an external impact on commerce, it is not difficult to imagine an argument that almost any local government regulation will have an extraterritorial impact.").

governments to take a specific action. However, cities may not cede authority to an international body to enforce a city-led agreement necessary to sustainably manage a commons resource. For example, to successfully avoid a tragedy, an emissions-trading initiative would likely bind each city to carbon emission limits. This would help minimize leakage and reduce the temptation to free ride. However, it is questionable whether it would be enforceable under international law; and it is unlikely cities would have any formally recognized legal recourse, therefore undermining attempts to limit free riding.<sup>128</sup> Thus, even if cities wanted to cede authority to limit transnational impacts among themselves, they would have no legally recognized rights under international law to do so.

The few cases in which international tribunals address local government actions relevant to global issues indicate a limited interpretation of municipal authority over commons resources. For example, in *Metalclad v. United Mexican States*, Metalclad alleged that a local government interfered with Metalclad's construction of a waste-treatment plant in violation of North American Free Trade Agreement (NAFTA).<sup>129</sup> During construction of its plant, Metalclad was informed by the City of Guadalupe that the facility did not have a required construction permit.<sup>130</sup> After Metalclad applied for a permit, the city denied it, claiming that Metalclad had not complied with the necessary permit and environmental requirements.<sup>131</sup> Metalclad submitted a Claim to arbitration, alleging that NAFTA prohibited the city's actions. In awarding Metalclad \$16.7 million, the arbitrator held that federal governments are responsible for the actions of their municipalities in all international treaties.<sup>132</sup> Further, while the city had the power to require permits, the federal government, who had already given its stamp of approval to the

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128. Nations could clearly establish a global arrangement in which local governments would have limits and participate in a trading system. However, the global community has been unable or unwilling to come to such an arrangement.

129. *Metalclad v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, ¶ 1 (Aug. 30, 2000), 5 ICSID Rep. 212 (2002).

130. *Id.* at 14.

131. *Id.* at 16–17.

132. *Id.* at 22, 35.

project, had the final decision under international law.<sup>133</sup> As a result, “Metalclad was entitled to rely on representations of federal officials and to believe that it was entitled to continue its construction of the landfill” regardless of the local government’s and community’s desires.<sup>134</sup>

In *Tecmed v. United Mexican States*, Tecmed purchased a landfill site in 1996.<sup>135</sup> The landfill had prior licenses to operate on five-year terms.<sup>136</sup> In 1998, Tecmed was denied an operating permit.<sup>137</sup> Tecmed sued alleging the local governments turned the communities against the landfill and encouraged the federal government to deny the operating permit.<sup>138</sup> The arbitration panel agreed with Tecmed, holding the decision on the operating permit was made not on factors concerning the operation of the landfill, but rather on local, “socio-political” concerns, which were not legally binding or persuasive under international law.<sup>139</sup> We see a similar perspective in *Republic of Chile v. MTD Equity*. MTD Equity purchased a site to construct a planned community.<sup>140</sup> The construction of the site was later halted as a result of improper zoning and a refusal by the local government to rezone the area.<sup>141</sup> MTD Equity contended that it was led to believe by the Chilean government that the rezoning would not be a problem.<sup>142</sup> The arbitration panel agreed with MTD Equity, holding that the Central Government should overrule the municipality to insure fair and equitable treatment.<sup>143</sup>

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133. *Id.* at 25.

134. *Id.*

135. *Tecmed v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, at 9 (May 29, 2003), 10 ICSID Rep. 130 (2004).

136. *Id.* at 9.

137. *Id.* at 9–10.

138. *Id.* at 11.

139. *Id.* at 50–52.

140. *Republic of Chile v. MTD Equity*, ICSID Case No. ARB/01/7, Award, at 1 (May 25, 2004), IIC 174 (2004).

141. *Id.* at 21.

142. *Id.* at 9–10.

143. *Id.* at 79. *See also* *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, *available at* <http://www.italaw.com/cases/1619> (case currently pending in which a Delaware limited liability corporation is challenging Ontario’s green jobs program, which gives preference to locally sourced solar and wind power); *Table of Foreign Investor-State Cases and Claims Under NAFTA and Other U.S. “Trade” Deals*, PUBLIC

These cases provide a small sampling of how local governments are perceived under international law. The cases exhibit a willingness to limit local authority over key global commons issues, including those relevant to the environment, waste, and land use. Decisions such as these prevent cities from “mak[ing] their own interpretations of local regulatory authority,”<sup>144</sup> and make clear that federal governments have the power, and potentially the obligation, to preempt local government actions.<sup>145</sup> *Tecmed* even limits local influences over federal government choices, as the federal government was unable to justify its refusal to grant an operating permit on local opposition.<sup>146</sup>

This is not to say that local governments are passive or ineffective on the international stage when it comes to global commons resources. There have been several subnational governments and groups, like C40 Cities, ICLEI, United Cities & Local Governments, and the Union of the Baltic Cities, that have taken steps to assert and protect their interests in global resources.<sup>147</sup> But these groups have predominantly relied on non-binding obligations. The challenge for these groups and local leaders remains that they have no recognized authority under international law and may not have an impact beyond national borders. “In a formal sense . . . agreements among states and cities have no international legal relevance. . . . [They] lack the binding character of treaties or customary international law among nation-states.”<sup>148</sup> Without a formal and enforceable agreement it is questionable whether local

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CITIZEN 21 (Aug. 2014), <http://www.citizen.org/documents/investor-state-chart.pdf> (noting pending case in which company challenged a Canadian province’s “moratorium on offshore wind production, stating that time was needed to study the environmental impacts of the relatively new energy source”).

144. Frug & Barron, *supra* note 91, at 43.

145. *Id.* at 44.

146. *Id.* at 47.

147. *See, e.g.*, Osofsky, *supra* note 7, at 66 (noting local leaders at the Copenhagen Conference of the Parties received attention for producing, among other things, the City Climate Catalogue, registering over 3,200 climate targets; and a Climate Communiqué, indicating that the local signatories represented more than half the world’s population and seventy-five percent of global greenhouse gas emissions). *See infra* notes 181–89 and accompanying text (describing the Union of the Baltic Cities in more detail).

148. Osofsky, *supra* note 7, at 73.

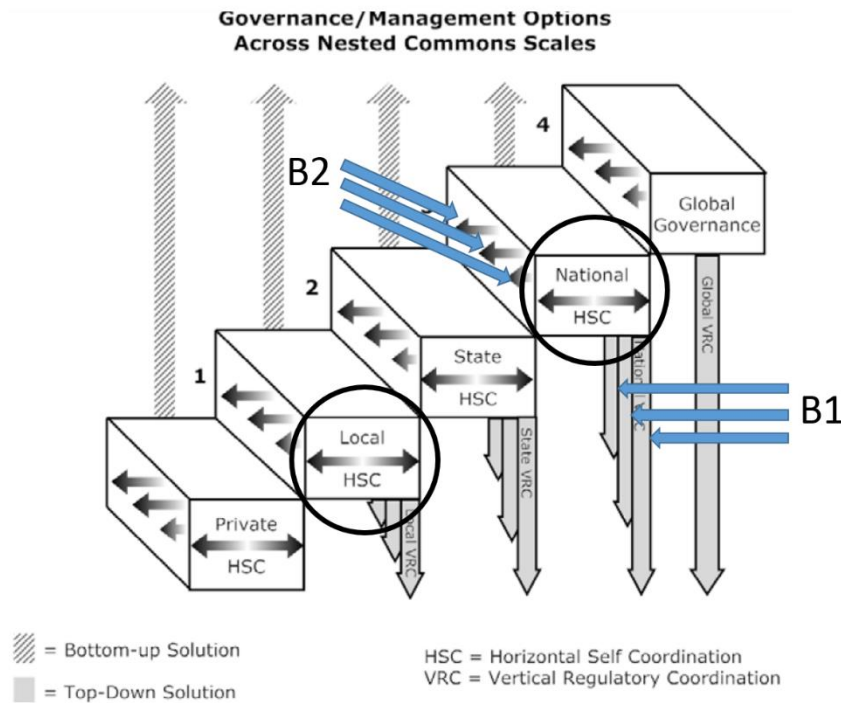
governments can limit free riding and provide the proper incentives to sustainably manage commons resources.

*B. National Layer*

Laws creating and empowering national governments also affect local governments' ability to address global commons collective action problems.<sup>149</sup> As noted above, international law defers to national law when addressing domestic issues. Thus, to get a more complete sense of the legal restrictions impacting local governments, laws empowering national governments and authorizing their vertical regulatory authority, indicated by B1 below, and laws empowering individual nations to horizontally collaborate or cede sovereignty to an international body, indicated by B2 below, must be considered. For purposes of exploration, this section focuses on U.S. constitutional provisions that empower the federal government and divide power between the state and federal governments. This Section explores how, in dividing that power, these clauses impact local governments on global commons.

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149. See Frug & Barron, *supra* note 91, at 11 (stating "national governments exercise important authority over cities, and thus . . . the content of domestic local government law is likely to shape [local governments'] behavior").

**Image 5**

As a starting point U.S. local governments are not protected by and have no inherent authority under the U.S. Constitution.<sup>150</sup> In addition, individuals have no protected constitutional right to be represented by local governments or to have services provided by local governments.<sup>151</sup> The U.S. Constitution, however, is relevant because, as creatures of state law, local governments have only that authority that the states can have. They cannot have more. Thus, if a state, and not the federal government, is authorized to act, it is

150. See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 174–80 (1907) (holding that local governments are created by state law and that the U.S. Constitution does not protect local governments from state government action). But see *Avery v. Midland Cnty.*, 390 U.S. 474, 482–86 (1968) (holding that state law may not create a general purpose local government that apportions voting unequally in violation of the Constitution).

151. See *Hunter*, 207 U.S. at 174–80.

possible (although not certain) that a local government may have a similar authority to act.<sup>152</sup> If, however, the federal government has the authority to act, states and local government are without the power to take action.<sup>153</sup>

While local governments are not formally recognized under the federal Constitution, in granting the federal government several powers, the U.S. Constitution has a number of effects on local governments and the global commons. Four constitutional provisions are particularly relevant when considering how local governments may act on global commons: 1) Article I, Section 10, the Compact Clause; 2) Article VI, the Supremacy Clause; 3) the dormant Foreign Affairs clause; and 4) Article I, Section 8, the dormant Commerce Clause.<sup>154</sup>

Pursuant to the Compact Clause, states—and therefore local governments—may not enter into international treaties without congressional consent.<sup>155</sup> The relevant portion of the Clause states, “[n]o State shall, without the Consent of Congress . . . enter into any agreement or compact with another State, or with a foreign power.”<sup>156</sup> As the Supreme Court held in 1833, states are “forbidden to enter into any treaty, alliance or confederation. If these compacts are with foreign nations, they interfere with the treaty-making power, which is conferred entirely on the general government.”<sup>157</sup> Returning to the hypothetical local government emissions trading initiative described in Part III.A., the collaborative could be struck down as an impermissible attempt by local governments to establish a “treaty, alliance or confederation.”<sup>158</sup> The trading initiative and

152. Whether states grant that authority to local governments is a matter of home rule and state preemption beyond the purview of this Article and is discussed in Rosenbloom, *supra* note 13.

153. Hudson & Rosenbloom, *supra* note 28, at 1306–07.

154. See Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1617–18 (1997) (also mentioning Article II, authorizing “the federal political branches to conduct foreign relations through the enactment of federal statutes, treaties, and executive agreements,” and Article III, extending “the federal judicial power to cases involving these federal enactments and to other transnational controversies”).

155. U.S. CONST. art. I, § 10, cl. 3.

156. *Id.*

157. *Barron v. City of Balt.*, 32 U.S. 243, 249 (1833).

158. See also Jonathan B. Wiener, *Think Globally, Act Globally: The Limits of Local*



other attempts by local governments to manage commons resources through binding agreements would likely violate the Compact Clause, as they are essentially “alliance[s] or confederation[s].” Thus, not only do local governments have little, if any, authority to enter into binding international agreements under international law, but also the Compact Clause makes it clear that U.S. local governments have no separate legal authority under federal law to enter into binding international agreements. This prohibition could further dissuade local governments from sustainably managing global commons resources, as it limits their ability to self-regulate through collaboration.

The Supremacy Clause reinforces the Compact Clause in this context by stating that the U.S. Constitution and federal laws (including treaties) “shall be the supreme law of the land.”<sup>159</sup> The Supremacy Clause consists of express, implied, and conflict preemption.<sup>160</sup> Although difficult to determine the exact contours of preemption, at a minimum it prohibits state governments—and therefore local governments—from enacting laws that conflict with federal law. By doing so, it limits local governments by narrowing the issues they may address and the solutions they may propose. This is particularly relevant when the challenges confronting local governments involve global commons resources, as any multi-jurisdictional challenge is likely to have some overlap with federal law and implicate the Supremacy Clause.<sup>161</sup>

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*Climate Policies*, 155 U. PA. L. REV. 1961, 1965 (2007) (noting that any state government attempt to regulate greenhouse gas emissions through collaboration would face Compact Clause challenges).

159. U.S. CONST. art. VI.

160. See *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 203–04 (1983); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). But see *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (stating that “in cases . . . where federal law is said to bar state action in fields of traditional state regulation . . . we have worked on the ‘assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress’”).

161. When authority to act is vested with state and local governments, and not with the federal government, and the state and local governments fail to act a tragedy may also occur. See *Federal Constitutions*, *supra* note 35, at 1010–11 (“Such is the case in the United States, where the U.S. federal government has no direct and limited indirect recognized constitutional authority over land use planning and regulation within the nearly 88,000 subnational

For example, New York City attempted to reduce its carbon footprint by, among other things, instituting mandatory fuel efficiency standards for taxis. Taxi companies sued and the U.S. district court issued a preliminary injunction.<sup>162</sup> The city repealed the law and issued new rules realigning taxi lease fees, which would have motivated taxi companies to consider fuel efficiency when purchasing vehicles.<sup>163</sup> The taxi companies challenged this legislation. In 2010, the Second Circuit struck down the local law as being preempted under the Supremacy Clause.<sup>164</sup> In this case, a local government was confronted with a common pool resource—clean air—but was not permitted to sustainably manage it in the form of stronger fuel efficiency standards because it was preempted by federal law.<sup>165</sup> Or as David Yassky, Taxi and Limousine Commission Chair, stated after the U.S. Supreme Court denied certiorari, “New York City is trying to reduce literally millions of tons of carbon dioxide emissions, and the Supreme Court has told us we can’t do it. . . . I cannot imagine . . . when Congress wrote the [law which was used as the basis for preemption] that they intended to handcuff states and cities trying to clean their own air.”<sup>166</sup> Pursuant to this case, cities are *prohibited* from acting irrationally and against their short-term economic interest, even if their action would help to preserve the long-term viability of the commons resource.

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government jurisdictions within its borders. As a result, the federal government arguably lacks constitutional authority to coordinate a vast abundance of individualized subnational rationality in the context of private land development and landed resource extraction activities, such as private forest management.”).

162. Metro. Taxicab Bd. of Trade v. City of N.Y., 2008 WL 4866021 (S.D.N.Y. 2008).

163. Metro. Taxicab Bd. of Trade v. City of N.Y., 615 F.3d 152, 155 (2d Cir. 2010).

164. *Id.* at 155, 158.

165. See generally *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 421–27 (2003) (finding California law requiring insurance companies to disclose information about holocaust-era policies to be in conflict with U.S. foreign policies). But see *Cruz v. United States*, 387 F. Supp. 2d 1057, 1073–77 (N.D. Cal. 2005) (upholding California law against preemption challenges claiming a conflict with U.S. / Mexican international relations); *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 714–16 (1985) (holding that local law regulating blood plasma collection was not preempted by federal law because federal regulation was clear that it was not “usurp[ing] local power”).

166. Michael M. Grynbaum, *City’s Lengthy Push for Hybrid-Engine Taxicabs Hits a Legal Dead End*, N.Y. TIMES, Feb. 28, 2011, available at <http://www.nytimes.com/2011/03/01/nyregion/01taxi.html>.

The U.S. Supreme Court has also ruled that the history and text of the Constitution imply a dormant foreign affairs power,<sup>167</sup> which prohibits local governments from having an adverse effect on foreign relations generally.<sup>168</sup> While the Supreme Court rarely relies on the power, the modern origin of the power derives from responses to state and local actions that attempt to influence world events through laws such as “buy-American statutes, overseas trade missions and business development offices . . . international investment incentive programs . . . nuclear-free zones or refugee sanctuaries.”<sup>169</sup> In *Zschernig v. Miller*, the Supreme Court ruled that “even in [the] absence of a treaty” or federal statute, a state or local government may violate the dormant foreign affairs feature of the Constitution by “establish[ing] its own foreign policy.”<sup>170</sup> Importantly, “neither the Constitution nor the courts have defined the precise scope of the foreign relations power that is denied to the states,”<sup>171</sup> at a minimum, however, it goes beyond treaties and applies to foreign policy generally.

In *Zschernig*, Oregon required nonresident aliens in probate proceedings to show that the alien’s country of residence would not confiscate an inheritance if awarded. In finding the Oregon law unconstitutional, the Court ruled that although

States . . . have traditionally regulated . . . estates[,] . . . those

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167. *Zschernig v. Miller*, 389 U.S. 429, 441 (1968). See also Brannon P. Denning & Jack H. McCall Jr., *The Constitutionality of State and Local “Sanctions” Against Foreign Countries: Affairs of State, States’ Affairs, or A Sorry State of Affairs?*, 26 HASTINGS CONST. L.Q. 307, 317–24 (1999) (setting forth history of dormant foreign affairs power).

168. See Goldsmith, *supra* note 154, at 1637.

169. See *id.* at 1637–38. See, e.g., MASS. GEN. LAWS ANN. ch. 7, § 22 H(a), J(a) (West 2000) (“[A] state agency, a state authority, the house of representatives or the state senate may not procure goods or services from . . . all persons currently doing business with Burma (Myanmar).”).

170. *Zschernig*, 389 U.S. at 441. See generally *Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300, 307–08 (Ill. 1986) (striking down an Illinois tax provision that discriminated against South African coins); *Nat’l Foreign Trade Council v. Natsios*, 181 F.3d 38, 45 (1st Cir. 1999), *aff’d on other grounds by Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000) (striking down a Massachusetts statute that limited state agencies’ procurement from companies doing business with Burma); *Tayyari v. N.M. State Univ.*, 495 F. Supp. 1365, 1378–80 (D.N.M. 1980) (striking down a state university’s policy of excluding Iranian students from admission in retaliation for the Iranian hostage crisis).

171. *Deutsch v. Turner Corp.*, 324 F.3d 692, 711 (9th Cir. 2003).

regulations must give way if they impair the effective exercise of the Nation's foreign policy. Where those laws conflict with a treaty, they must bow to the superior federal policy. *Yet, even in absence of a treaty, a State's policy may disturb foreign relations. . . . [A]s we have said, [the Oregon law] has a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems.*<sup>172</sup>

Accordingly, even though there was no actual conflict requiring preemption, the Court ruled that a disruption in foreign policy generally was sufficient to render the state law unconstitutional.<sup>173</sup> Thus, something like the local government emissions trading initiative may be an impermissible attempt to increase local governments' authority in the climate debate at the expense of the federal government. The dormant foreign affairs clause and its interpretation pursuant to *Zschernig* highlight the potential lack of authority local governments have in affecting global commons resources. It seems hard to imagine local governments successfully managing a global commons resource without having some impact on foreign relations, and therefore, being subject to a potential dormant foreign affairs challenge.

Finally, the dormant Commerce Clause may also limit local governments' authority to address global commons challenges by restricting regulation of interstate commerce. The dormant Commerce Clause has been found to prohibit state or local government discrimination against parties in other states.<sup>174</sup> Any multi-jurisdictional attempt to address global commons issues could potentially result in an interstate commerce issue, as well as some type of discrimination. To minimize leakage or free riding, for example, an emissions trading initiative may include provisions

172. *Zschernig*, 389 U.S. at 440–41 (emphasis added) (citations omitted).

173. *Id.* See also *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 401, 425–26 (2003) (finding a California law requiring insurer who did business in Europe from 1920–45 to disclose information regarding policies to be in violation of the dormant foreign affairs power because it touched upon foreign relations even though the state and the federal government had common goals).

174. See *City of Phila. v. New Jersey*, 437 U.S. 617 (1978) (holding a New Jersey statute prohibiting importation of solid or liquid waste from outside the state violated the dormant Commerce Clause).

concerning how participating local governments can engage in activities with non-participating local governments. A binding agreement may distinguish between non-participating and participating local governments in an attempt to incentivize participation in the initiative. However, it would also likely discriminate against some cities. Unless the participating cities are able to show a legitimate interest in preserving the commons resource, the anti-leakage discrimination provision against parties in other states or countries is likely to fail under a dormant Commerce Clause analysis.<sup>175</sup>

The combination of these constitutional clauses limits the ability of local governments to address global commons challenges through their only two *self-initiated* options—collaboration and altruism.<sup>176</sup> Local governments face significant legal hurdles in attempting to form multi-jurisdictional collaborations, especially those intended to bind other local governments in a way that would address free riding. And, as shown in the case involving New York City and fuel efficiency, local governments face hurdles in trying to act altruistically and individually, leaving them without many options on the global commons.

#### CONCLUSION: REDUCING BARRIERS & ENCOURAGING LOCAL GOVERNMENTS TO SUSTAINABLY MANAGE GLOBAL COMMONS RESOURCES

In dissecting the various influences which impact local governments as they make decisions relevant to global commons

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175. See *Maine v. Taylor*, 477 U.S. 131 (1986) (holding a Maine statute prohibiting importation of live bait did not violate the dormant Commerce Clause because protecting native fisheries from parasites and non-native species is a legitimate purpose that cannot be served as well by nondiscriminatory means).

176. This is not to suggest that international, national, or state governments could not intervene and avoid a tragedy among local governments. For example, the federal government could step in to help avoid a local tragedy by requiring a local government to internalize the costs. See *United States v. Metro. Water Reclamation Dist. of Greater Chi.*, No. 11 C 8859, 2014 WL 64655 (N.D. Ill. Jan. 6, 2014) (consent decree between the EPA and a local government requiring the local government to invest three billion dollars in sewer infrastructure to minimize the environmental impact from combined sewer outfalls). Unfortunately, the federal and many state governments have been unwilling to intervene on issues such as climate change.

resources, Part III highlights at least two key points. First, international and national constitutional, statutory, and regulatory regimes that empower various levels of government establish barriers, intentionally or unintentionally, that interfere with local governments' options to act altruistically or collaboratively. Second, those barriers add a layer of complexity to the commons analysis, such that local governments cannot be considered equivalent to Hardin's "independent, rational, free-enterpriser."

To motivate and encourage local governments to sustainably manage global commons resources, the international and national barriers must be reduced or removed. This final Part begins what will hopefully be a more robust discussion on reimagining the role of local governments when interacting with global commons resources. This Part sets forth three examples that, when expanded, could selectively reduce barriers prohibiting local governments from sustainably managing resources without fully sacrificing national sovereignty or supremacy. The first example describes the Union of the Baltic Cities (UBC), a local government collaborative that asserts authority over multi-jurisdictional issues as far as possible under existing law. The second example extends the holding in *Robinson Township. v. Pennsylvania*<sup>177</sup> and obligates local governments to sustainably manage resources, including giving them power to collaborate with local governments from around the world. The final example is an illustration of an international government authorizing local governments to collaborate and sustainably manage commons resources. This example is based on the recently proposed European Union's Charter for Multilevel Governance in Europe.<sup>178</sup> The three examples address different options for empowering local governments and offer alternatives to depleting commons resources.

The first example involves an existing collaboration among local governments on the Baltic Sea. Recognizing that many cities on the Baltic Sea were having multi-jurisdictional impacts and nations were failing to sustainably manage the commons resources in the Sea,<sup>179</sup> the

177. *Robinson Twp. v. Pennsylvania*, 83 A.3d 901 (Pa. 2013).

178. *Charter for Multilevel Governance in Europe*, (April 3, 2014), available at <http://cor.europa.eu/en/activities/governance/Pages/charter-for-multiLevel-governance.aspx>.

179. The dissolution of the USSR helped facilitate the collaboration as well. See Bødker

Union of Baltic Cities (UBC) was created. The UBC is designed to promote and strengthen cooperation and exchange of experience among the cities . . . , to advocate for common interests of the local authorities of the region, and to act on behalf of the cities and local authorities in common matters towards regional, national, European and international bodies, as well as achieving sustainable development in the Baltic Sea Region.<sup>180</sup>

With 108 city members from the ten Baltic Sea countries, the UBC has thirteen thematic commissions, including Education, Energy, Environment, Health and Social Affairs, Transportation, and Urban Planning—all implicating key global commons resources. The Commission on Environment, for example, is responsible for the UBC's work on environmental and urban sustainability, including implementation of the Sustainable Action Programme.<sup>181</sup> The UBC also seeks to increase cooperation and exchange ideas between its member cities.<sup>182</sup> For example, the UBC is currently compiling a best practices database, consisting of policies to promote sustainable development.<sup>183</sup>

The UBC provides a glimpse of the potential positive impact local governments could have on global commons resources if local governments are incorporated into the management of those resources. To achieve that potential, local governments need to be empowered to collaborate and regulate extraterritorially, specifically by giving them the mechanisms to counteract

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Andersen, *Union of the Baltic Cities Activities 1991–2011*, in REPORTS ON UBC ACTIVITIES, available at <http://www.ubc.net/plik,5748.htm>.

180. Statute of the Union of the Baltic Cities art. 1, available at <http://www.ubc.net/documentation,55,194.html>.

181. See UBC SUSTAINABILITY ACTION PROGRAMME 2010–2015: AGENDA FOR SUSTAINABLE BALTIC CITIES, available at <http://www.ubc.net/plik,1956.html>.

182. See *Reports on UBC activities*, in REPORTS ON UBC ACTIVITIES, 66–67, available at <http://www.ubc.net/documentation,56,1006.html> (setting forth programs to exchange best practices and experiences relevant to sustainability).

183. Cities for a Sustainable and Prosperous Baltic Sea Region, UBC STRATEGY 2010–2015, available at <http://www.ubc.net/documentation,55,195.html>. For an example of a recent state collaboration that may have a similar effect, see Carolyn Whetzel, *Eight States Unveil Joint Plan to Put More Zero-Emission Vehicles on Roads*, ENERGY & CLIMATE REP. (BNA) (May 29, 2014), available at [http://info.bna.com/climate/summary\\_news.aspx? ID=270127](http://info.bna.com/climate/summary_news.aspx? ID=270127).

incentives promoting rational behavior.

The second example illustrates how local governments could be authorized to collaborate and regulate extraterritorially.<sup>184</sup> This example is an extension of the Pennsylvania Supreme Court's ruling in *Robinson Township*. In *Robinson Township*, the Pennsylvania Supreme Court struck down a state statute that sought to "preempt and supersede 'local regulation of oil and gas operations regulated by the [statewide] environmental acts.'"<sup>185</sup> The court based its holding on a state constitutional provision that gave the state—and therefore, cities—an affirmative obligation to protect the environment.<sup>186</sup> Cities, the court ruled, were required by the state constitution "to act affirmatively to protect the environment," and that obligation could not be circumvented or limited by the state.<sup>187</sup> Because the state statute prohibited local governments from preserving natural resources—many of which were multi-jurisdictional—the statute interfered with cities' constitutional obligation and violated the state constitution.

The holding in *Robinson Township* takes a different approach than that assumed by the international and national laws discussed in Part III. While the laws discussed in Part III limit local governments' ability to protect commons resources, the court in *Robinson Township* interpreted the state constitution as compelling local governments to preserve natural capital and thus, the related commons resources. In rational choice theory parlance, cities,

184. This example focuses on empowering individual cities, as opposed to a collaboration comprised of cities, which is discussed in the third example.

185. *Robinson Twp. v. Pa.*, 83 A.3d 901, 970 (quoting PA Act 13 of 2012, the statute at issue). For a detailed description of the case see John C. Dernbach, James R. May & Kenneth T. Kristl, *Robinson Township v. Commonwealth of Pennsylvania: Examination and Implications*, (Widener Law School Legal Studies Research Paper Series no. 14-10, Mar. 2014), available at <http://ssrn.com/abstract=2412657> [hereinafter "Examination and Implications"].

186. The constitutional provision provided:

[P]eople have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people. PENN. CONST. art. I, § 27.

187. *Robinson Twp.*, 83 A.3d at 958.



pursuant to *Robinson Township*, are compelled to act irrationally.

If scaled up to the international level, the *Robinson Township* holding could provide a model as to how local governments participate in sustainably managing commons resources. The decision could help treaty and policy drafters by identifying ways in which local governments could facilitate the protection of commons resources. While the specifics of each treaty or policy will differ, the *Robinson Township* holding raises, at a minimum, the question of whether there is a role or sphere of authority for local governments to help achieve the objectives of a treaty or policy when that policy has effects beyond the local government borders.

The final example involves an extension of the European Union's Charter for Multilevel Governance in Europe. The Committee of Regions (CR) is an EU body, comprised of 353 "regional and locally elected representatives from the 28 EU countries."<sup>188</sup> The CR issues over fifty opinions a year analyzing EU legislation.<sup>189</sup> As noted above in Part III.A., the CR does not have a substantive vote on legislation. However, the CR recently proposed the Charter for Multilevel Governance in Europe (Charter) to expand its authority.<sup>190</sup> The Charter, loosely based on the European Charter of Local Self Government,<sup>191</sup> opened for signatures in May of 2014.<sup>192</sup> The overall goal of the Charter "is to connect regions and cities across Europe . . . to [create] policy solutions that reflect the needs of the citizens."<sup>193</sup> The Charter suggests that local governments should, "work together . . . to achieve greater economic, social and territorial

188. *CoR in a nutshell*, EUROPA, <http://cor.europa.eu/en/about/Pages/index.aspx#> (last visited Sept. 25, 2014).

189. *Id.*; see also RALPH H. FOLSOM, *PRINCIPLES OF EUROPEAN UNION LAW* 35 (3d ed. 2011).

190. *The Charter for Multilevel Governance in Europe*, *supra* note 178.

191. The European Charter of Local Self Government was written by the Council of Europe, which has 47 member states that includes all the states in the EU. *Who we Are*, COUNCIL OF EUROPE, <http://www.coe.int/aboutCoe/index.asp> (last visited Sept. 25, 2014). The Council of Europe is not a part of the EU, but they do work together. *How We Work*, COUNCIL OF EUROPE, <http://www.coe.int/aboutCoe/index.asp?page=CommentTravaillonsNous&l=en> (last visited Sept. 25, 2014). The Charter of Local Self-Government allows signatory nations, local authorities to cooperate when they have common interests. European Charter of Local Self-Government, art. 10, para. 1.

192. See *The Charter for Multilevel Governance in Europe*, *supra* note 178.

193. *Id.* at Preamble, para. 3-4.

cohesion in Europe.”<sup>194</sup> The Preamble further suggests that there be an emphasis on “joint projects to tackle the common challenges ahead.”<sup>195</sup> The suggested action plan for the Charter is laid out in Title 2 with the goals being to “cooperate closely with other public authorities [and] think[] beyond traditional administrative borders, procedures, and hurdles . . . to create networks between . . . political bodies and administrations from the local to the European levels.”<sup>196</sup> While not legally binding, the Charter is a step towards acknowledging the multi-jurisdictional impacts local governments have on global commons resources and the impact global commons resources have on local governments. The Charter represents an international effort to recognize local governments’ legal authority to engage in multi-jurisdictional collaboratives as well as sustainably manage commons resources. Like the *Robinson Township* case, the Charter begins to acknowledge local governments’ role in managing global commons resources and moves toward empowering local governments.

There are no doubt additional forces propelling local governments to make “rational” choices. Many local governments, for example, simply are not in a financial position to take on the kind of upfront costs that may be involved with addressing global commons resource challenges.<sup>197</sup> Likewise, while some local governments may want to continue policies that consume commons resources, some cities would do more if given more legal authority to do so. As actors appropriating global commons resources, local governments can alter Hardin’s predicted outcome and help avoid a tragedy if empowered to do so and if provided with the proper level of motivation. To ensure the continued availability and preservation of commons resources, local governments should, at a minimum, be able to have a positive impact on global commons resources if they desire to do so.

I am not suggesting that global commons resources be

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194. *Id.* at Preamble, para. 1.

195. *Id.* at Preamble, para. 1.

196. *Id.* at Title 2.

197. See Jonathan Rosenbloom, *Funding Adaptation*, 47 J. MARSHALL L. REV. 657, 675–79 (2014) (describing the financial difficulties facing many local governments).

exclusively managed by local governments; nor am I suggesting that the division of legal authority set forth in Part III above is unjustified. However, I am suggesting that the combination of international and national legal restrictions currently in place severely dilutes and negates local governments' ability to address multi-jurisdictional commons challenges. This is particularly problematic when there is political will at the local level, and little—or none—at the international or national level.